
# Resolving Dismissal Disputes: A Comparative Analysis of Public Arbitration Bodies in South Africa and England

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Aisha Adam Date

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## CHAPTER ONE

## 1. INTRODUCTION

In almost every workplace around the world there is conflict, especially when it comes to workplace employment relations. This conflict often translates into disputes about rights in the employer and employee relationship. The justice system aims to overcome these difficulties through the balancing of power amongst the parties.[1] Unfortunately, not all these disputes are handled as effectively as others and the courts are left with a crisis that remains unresolved. This has increased the need for and value of resolving disputes through other means which provide better prospects, social justice and closure to the courts.

It is apparent that the use of alternative dispute resolution to resolve disputes has proven useful to employees and employers over the last decade. An efficient, accessible and flexible dispute resolution system is one that is without a doubt essential to the growth and progression of any industry. Labour law in particular is an area wherein lies a great deal of disputes, with problems ranging from discrimination to unfair labour practices to dismissals. Industrial systems attract a great variety of dismissal disputes based on the presence of substantial human resources.

The use of arbitration to resolve employment dismissal disputes has been a topic of interest in South Africa and England over the last decade. Both countries have established institutions aimed at resolving disputes with a more rapid response compared to litigation in the courts. As creatures of statute, both institutions aim to resolve disputes concerning employment in a manner that balances the rights of the parties whilst providing expeditious service in a manner different to the courts. In England, the public arbitral route is through the Advisory, Conciliation and Arbitration Service, "ACAS," and in South Africa there is the Commission for Conciliation, Mediation and Arbitration Services, the "CCMA." These public institutions aim to ensure that alternative means of labour dispute resolution can resolve the issue rather than resorting to courts.

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[1] Ury W.L., Brett, J.M. & Goldberg S.B, "*Three approaches to resolving disputes: interests, rights and power" (1988). See also* Lewicki, R.J., Barry, B. & Saunder, D.M. (eds), "*Negotiation: readings, exercises and cases,"* 5th ed Boston: McGraw- Hill/ Irwin.

Dismissal disputes in South Africa and in England are often controversial and their resolution tends to dominate the claims that reach both the courts[2] and alternative dispute resolution systems.[3] A prominent method used to resolve dismissal disputes is arbitration. The primary objective of arbitration procedures in dismissal disputes is to provide "simple, quick, cheap and non-legalistic"[4] dispute resolution.

Choosing England as a source of comparison against South Africa is mainly due to the position England has occupied in South Africa since its colonisation. English law has been an influential framework for South African labour law, and still remains a guideline today in areas which are still developing. This historical link provides a solid foundation to conduct an effective comparison to evaluate whether each countries' system is making steps in the right direction and how far each has progressed in ways the other still has to. Despite the countries' differing political and socioeconomic contexts, the argument for arbitration over the use of conventional court litigation when resolving dismissal disputes is consistent in both labour law structures.[5]

The intention of this dissertation is to carry out a comparative analysis of the arbitration processes in South Africa and England by using substantive criteria to evaluate whether their approaches are providing dispute resolution services to their users in a way that meets the needs of the parties and the objectives of the governing statutes. Firstly, an overview of the history, governing legislation and the arbitration procedure implemented in each country's dispute resolution system is provided. The historical overview sets the foundation for each country's social background and provides insight into the political shifts which influenced the manner in which industrial relations were handled. An overview of the current dispute resolution legislation and strategies will provide a baseline from which one can examine how far previous legal instruments were utilised to resolve matters.

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[2] Benjamin P, "*Conciliation, Arbitration and Enforcement: The CCMA's Achievements and Challenges,"* (2009) 30 *ILJ* 29.
[3] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No 47. See also CCMA 2015/2016 Annual Report. Report Number 209/2016. CCMA Publications.
[4] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No 47 p 20.
[5] Clark J, "*Adversarial and Investigative Approaches to the arbitral resolution of dismissal disputes: A comparison of South Africa and the UK*," *ILO* Vol 28 No 4 (1999) p 319.

In order to assess the growth of South Africa and England in this regard, their public arbitration bodies are then scrutinised and their contribution to developing arbitration is compared to court litigation. In the final chapters, recommendations are made to overcome the challenges emanating from each arbitral system. Finally, an evaluation is carried out showing how each system can be improved upon, with reference to the strengths identified in their comparator system, amongst other considerations.

## CHAPTER TWO

## THE ALTERNATIVE DISPUTE RESOLUTION SYSTEM OF SOUTH AFRICA

### 1. INTRODUCTION

As a growing democracy, the heart of South Africa lies in its people and their access to justice. The establishment of the new government brought about numerous changes to the development of the country; particularly, the necessity to marry the Constitutional rights with well-established, and reformed labour laws. In a developing economy, it is imperative for industries to operate coherently through their use of human and material resources. Unfortunately, the shift to human-based resources often leads to an increase in industrial disputes.

The expectation that a labour environment unburdened by conflict is far-fetched, as the attempt to maintain harmonious employment relationships tends to accentuate differing interests and objectives. This fragile relationship is further fragmented due to the economic and political zeitgeist that surrounded South Africa during apartheid, and continues to permeate society to this day. Thus, the impact of the working environment took its toll on the courts as the increase in disputes resulted in greater delays and less resolution amongst parties of dispute.

This chapter aims to analyse the dismissal disputes procedure of South Africa. To do this, it is crucial to look at the background of dispute resolution systems. Before the commencement of the current Labour Relations Act (LRA),[6] dispute resolution was regulated by the Industrial Conciliation Act,[7] which was in later years modified and proclaimed the Labour Relations Act 1956.[8] The Industrial Conciliation Act,[9] like its successor, was partly aimed at the prevention and settlement of disputes between employees and employers.[10] Any labour litigation that took place during this period was dealt with by the Industrial Court (IC), the Labour Appeal Court (LAC) and the then Appellate division of the Supreme Court,

[6] Labour Relations Act (LRA) Act 66 of 1995.
[7] Industrial Conciliation Act, Act 28 of 1956 subsequently renamed the Labour Relations Act 1956.
[8] Labour Relations Act 1956.
[9] Industrial Conciliation Act, Act 28 of 1956.
[10] Grogan J, "*Labour litigation and dispute resolution,*" 1st ed (2010) 2.

acting as the highest court in labour issues.[11] Civil courts also played a substantial role in employment and labour matters.[12]

Furthermore, this chapter will address the substantial legislative documents that were implemented to resolve historical problems. This includes prominent governing instruments such as the Constitution as well as the reformed LRA. Additionally, the shift to the governing alternative dispute resolution body, the "Commission for Conciliation, Mediation and Arbitration (CCMA)," following the abolition of apartheid will be evaluated, as well as the CCMA's procedures in relation to arbitration in dismissal cases.

## 2. HISTORY OF DISPUTE RESOLUTION IN SOUTH AFRICA

Before analysing and scrutinising the dispute resolution system of South Africa, one must look at its background and history. The history of South Africa plays a crucial role in the way the framework of its labour legislature stands today. Ferreira[13] describes the importance of reviewing South Africa's history as a means leading to a greater understanding of our current situation and evaluating how South Africa has progressed as a country.[14] The domination of conflict between worker groups as well as the dualistic system that arose during these historical periods showed how far labour relations affected the dispute resolution system.[15]

Prior to 1994, the South African labour arena was characterised by an agricultural economy, and the discovery of gold in 1886 led to the beginning of an industrial revolution.[16] Due to the principles of apartheid, classification of workers was by race, skills and language.[17] During this time, the government passed a series of legislation to resolve labour disputes. However, the only form of dispute resolution mechanisms was the Industrial councils.[18] Due to the increase in urbanisation, shortages of food and inadequate jobs, especially amongst black workers, it was clear something needed to be done. The Industrial Legislation

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[11] Ibid.
[12] Ibid.
[13] Ferreira G, "*The Commission for Conciliation, Mediation and Arbitration: Its effectiveness in dispute resolution in labour relations*" (2004) Politeia vol 23 No 2 p73.
[14] Ibid.
[15] Ibid.
[16] Ibid, p74
[17] Ibid.
[18] Fergus E & Rycroft A, *"Refining review"* 2012 Acta Juridica p75.

Commission of 1935 considered a labour tribunal.[19] This idea of a labour tribunal was turned down, but shortly after, a National Labour Board proposed a tribunal with a more lenient approach to rules and procedure.[20] Ironically, this too was turned down until the Industrial tribunal was set up in terms of the Industrial Conciliation Act 28 of 1956.[21] By the time the Wiehahn Commission was set up in 1979,[22] the criterion of race ceased to be a factor in recognising trade unions.[23]

Additionally, the socio-political changes resulted in a variety of dispute resolution developments, such as the 1979 Industrial Court with the legal status of a quasi-judicial tribunal,[24] and the ways in which decisions of the court were reviewed or appealed. Initially, any reviews to the industrial courts' decisions could be brought to the Supreme Court.[25] However, following the amendments to the LRA in 1988, a Labour Appeal Court was formed consisting of six separate divisions. The majority of the appeals were brought for unfair labour practices under s 17(21A)(a) of the Labour Relations Act of 1956.[26]

It remains, however, that the abolition of apartheid in 1994 led to the greatest changes to labour law, including the reformation of legislation and re-organisation of numerous governmental institutions.[27] The implementation of the Labour Relations Act (LRA) in 1995[28] resulted in significant changes to the labour institutions in South Africa. The procedures carried out by the courts prior to the new Act[29] were lengthy, complex and ineffective in resolving disputes. One of the paramount changes made to dispute resolution during this time was to the handling of dismissal disputes. Prior to the Act, dismissal disputes were handled rather poorly as they were tedious and expensive, resulting in unsatisfactory results.[30] For example, the case of *Chevron Engineering (Pty) Ltd v Nkambule*[31] took the Supreme Court of Appeal

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[19] Fergus E & Rycroft A, *"Refining review"* 2012 Acta Juridica p170.
[20] Ibid.
[21] Industrial Conciliation Act, Act 28 of 1956.
[22] Commission of Enquiry into Labour Legislation part 1 RP 47/1979.
[23] Ferreira G, "*The Commission for Conciliation, Mediation and Arbitration: Its effectiveness in dispute resolution in labour relations*"(2004) Politeia vol 23 No 2 p75.
[24] Fergus E & Rycroft A, *"Refining review"* 2012 Acta Juridica p172.
[25] Ibid.
[26] Industrial Conciliation Act, Act 28 of 1956.
[27] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No 47 p1.
[28] The Labour Relations Act (LRA), Act 66 of 1995.
[29] Ibid.
[30] Backer, W and Olivier, M, "*Guide to the New Labour Relations Act"* (1996) p7.
[31] [2004] 3 BLLR 214 (SCA).

approximately ten years to resolve. The case involved the dismissal of workers participating in an unlawful strike.[32] Brand[33] describes the system of dispute resolution in the past as something which simply failed to work.

It is clear that dispute resolution institutions in the past were prone to changing with the socio-political environment of the time. As racial bias no longer served any legislative significance after 1994, the drafters of the LRA could focus on aligning the institution with the principles of a democratic system. The revolutionary change in this era was found in the new LRA statute,[34] through the formation of a new independent body set to serve and resolve disputes through alternative means such as conciliation, mediation and arbitration. This body, known as the CCMA, possessed juristic personality and aimed to play a vital role in the resolution of disputes.

### *2.1 Private Arbitration vs. Public Arbitration*

Private arbitration for employment disputes has been in the labour arena since the early 1980's.[35] It has been used as an alternative form of dispute resolution to that set out in the LRA of 1956 for a variety of reasons. Its main concern was to address issues that existed in the court procedures at the time, including lengthy court delays and uncertainty in legal principles regarding labour matters.[36] The successes of private arbitration tribunals, such as IMMSA (Independent Mediation Services of South Africa), spurred on the formation of the CCMA. One of IMMSA's major advantages over conventional methods was its ability to reduce the time taken to resolve dismissal disputes.[37]

One of the significant differences between private and public arbitration is that the process is conducted by agreement between the parties who have discretion in choosing an arbitrator, references and powers.[38] Another difference is that the governing statute for a private arbitrator to derive authority over their powers is

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[32] Ibid.
[33] Brand, J; Lotter, C; Mischke, C and Steadman, F, "*Labour Dispute Resolution"* (1997) Juta & Co. Ltd p26.
[34] The Labour Relations Act (LRA), Act 66 of 1995.
[35] Jordaan B, "*Jordaan B & Stelzner: Labour Arbitration with a commentary on the CCMA rules,"* 2nd ed (2011) p4.
[36] Ibid.
[37] O'Regan, C, *"The development of private labour arbitration in South Africa: A review of the arbitration awards"* (1989) 10 ILJ 557.
[38] Jordaan B, "*Jordaan B & Stelzner: Labour Arbitration with a commentary on the CCMA rules,"* 2nd ed (2011) p4.

through the Arbitration Act,[39] whereas public arbitration is governed by the LRA. Furthermore, most of the formalities present in private arbitration are usually dependent on the discretion of the parties, whereas in public arbitration the government or the CCMA usually determines them.

The law regulations of dispute resolution and the creation of the CCMA will be discussed in more detail in the following sections.

## 3. LAW GOVERNING DISPUTE RESOLUTION

Before looking at the CCMA in-depth, it is essential to describe the legal instruments leading up to its formation. The first labour relations statute was the Industrial Conciliation Act of 1924. The Act was a ground-breaking instrument that established a framework for collective bargaining, dispute resolution and industrial action.[40] Unfortunately, it prejudiced black workers,[41] and this entrenchment of preventing them from obtaining key qualifications resulted in racially discriminating job reservations.[42]

After being under immense pressure from independent trade union movements, labour legislation was reformed to extend labour relations to public servants.[43] Towards the end of apartheid, the 1993 Interim Constitution entrenched numerous labour rights and changes, which led to the inexorable drift towards the Labour Relations Act.[44]

### *3.1 The Constitution*

As with any country, the Constitution[45] is the foundation for the basic rights endowed upon its citizens. The Constitution is said to be an embodiment of the will of the people,[46] and unlike statutory regimes, this instrument represents a greater scheme as its enforcement covers a larger spectrum. Although s 23 of the

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[39] Arbitration Act 42 of 1965.
[40] Ibid.
[41] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"*(2013) *ILO* No 47 p2.
[42] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No 47 p3.
[43] Fergus E & Rycroft A, *"Refining review,"* 2012 Acta Juridica p171.
[44] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No 47 p1.
[45] The Constitution of the Republic of South Africa
[46] Byrnes J, *"The constitution and the people,"* American Bar Association Journal (1939) 25(8)) 671–671.

Constitution embodies the main rights concerning labour relations, there is no explicit mention of dispute resolution or dismissals. Rather, this section describes the rights to which every employee is entitled, such as "fair labour practice, to form and join a trade union, to strike…"[47]

On the other hand, s 33 outlines the right to administrative action that is lawful, reasonable and procedurally fair.[48] This provision imposes an obligation on commissioners to perform functions according to the conditions set out in s 33 of the Constitution; ensuring transparency is encouraged throughout public administration.[49] Furthermore, s 34 stipulates "*the right to have any dispute, which can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another impartial tribunal or forum."*[50] This signifies that dispute resolution should not be limited to courts or conventional forms of litigation but rather be open to the possibility and promotion of alternative mechanisms. Traditionally, court litigation proves to be tedious, lengthy and "pitted with technicalities,"[51] while other means of dispute resolution may prove to be more cost effective and efficient, thus opening more doors to justice.

### *3.2 The Labour Relations Act 66 of 1995*

The creation of the LRA was aimed at restructuring the legal and the organisational foundations of collective labour law and unfair dismissal law. Its goal was to create a coherent legal instrument that would provide guidance in labour relations applicable to all sectors of the economy. One of the main purposes of the LRA was to revolutionise the labour system in South Africa as the framework for handling disputes prior to the LRA was criticised as "contradictory, chaotic and casuistic."[52]

The LRA intended to provide user-friendly procedures using alternative means of dispute resolution. Another prominent function of the LRA is set out in s 1, which stipulates that the purpose is to *"advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the*

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[47] The Constitution of the Republic of South Africa, s 23.
[48] The Constitution of the Republic of South Africa, s 33.
[49] Ibid.
[50] The Constitution of the Republic of South Africa, s 24.
[51] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No 47 p3.
[52] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No 47 p4.

*primary objects of this Act…"*[53] A "primary object" described in s 1 is to "promote the effective resolution of labour disputes."[54] Steenkamp and Bosch[55] noted that an effective dispute resolution system is one that is structured, accessible and inexpensive, and it is one that resolves disputes finally.[56]

The primary vehicle for alternative dispute resolution is the CCMA, which has a mandate to resolve most dismissal disputes. Interest-based disputes are usually resolved through industrial action or collective bargaining, while disputes of rights are usually resolved through conciliation or adjudication.[57] The first stage in dismissal dispute resolution is always conciliation, but if the disputes remain unresolved, it may be adjudicated or arbitrated under the CCMA or an accredited bargaining council.[58]

### *3.2.1 Explanatory Memorandum to the LRA*

Section 112 of the LRA[59] led to the creation of two new institutions for adjudication and the resolution of disputes; the CCMA and a system of labour courts. In order to address why the LRA was establishing new bodies of resolution, it is necessary to look at the Explanatory Memorandum to the LRA.[60] This document outlines the main motivations behind the changes to the labour system but also indicates why the LRA[61] was promulgated in the first place.

It is no news that the dispute resolution processes prior to the democratic shift in politics was not working. The turbulent strikes and the inability to resolve issues timeously and effectively proved the breakdown in the statutory system of dispute resolution in the country.[62] According to the statistics provided by the Labour Department, less than 30 per cent of the disputes referred to industrial councils were settled and approximately 20 per cent of the conciliation boards resulted in

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[53] The Labour Relations Act (LRA), Act 66 of 1995, s 1. *See Also s 3 of the LRA.*
[54] Ibid.
[55] Steenkamp A & Bosch C, *"Labour dispute resolution under the 1995 LRA: Problems, pitfalls and potential,"* (2012) Acta Juridica p121.
[56] Ibid.
[57] Ibid.
[58] Ibid.
[59] The Labour Relations Act (LRA), Act 66 of 1995., s 112.
[60] Explanatory Memorandum to the Labour Relations Act (1995) 16 *ILJ* 278.
[61] The Labour Relations Act (LRA), Act 66 of 1995.
[62] Explanatory Memorandum to the Labour Relations Act (1995) 16 *ILJ* 278 p326.

settlement.[63] At the time, it was evident that independent mediation services were proving more successful with a success rate of over 70 per cent.[64]

Another problem evident in the labour system was that the conciliation procedures were too technical and any errors made would often prejudice an applicant's claim. One of the main issues was that the merits of the case were not considered, and this often led to workers resorting to other means when resolving their problems.[65] Therefore, strikes and the high cost implications thereof left the whole statutory regime of resolving disputes ineffective.[66]

Furthermore, if any applicant had to make a claim, not only would understanding the process seem technical but this was further complicated when the adjudication system had its own burdens. For starters, the Industrial Court held no status in the judiciary based on the courts' remuneration and their job security.[67] Secondly, any appeals to the courts resulted in lengthy delays, which often defeated the whole purpose of gaining an appeal due to the tardiness in when it is heard. Finally, there was an overlap between the courts' jurisdictions when it came to appeals and it was clear that the Labour Appeal Court (LAC) held no standing in labour relations as the Supreme Court reigned supreme.[68]

Thus, the draft LRA bill called for the establishment of an independent but government-funded organisation dedicated to resolving disputes. The draft bill also provided for the resolution of a variety of disputes by arbitration and conciliation, including dismissals.

### *3.2.2 Code of Good Practice*

A prominent feature of the LRA when dealing with dismissal disputes is the Code of Good Practice described in Schedule 8.[69] The Code of Good Practice is meant to provide "legitimate, coherent, accessible and flexible jurisprudence"[70] when it comes to dispute resolution and other labour relations, and lays out the approach to adopt

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[63] Ibid.
[64] Ibid.
[65] Explanatory Memorandum to the Labour Relations Act (1995) 16 *ILJ* 278 p327.
[66] Ibid.
[67] Explanatory Memorandum to the Labour Relations Act (1995) 16 *ILJ* 278 p326.
[68] Ibid.
[69] The Labour Relations Act 1995, Schedule 8. *See also s 203.*
[70] Ibid.

regarding dismissals. This is fitting given that the majority of arbitration cases revolve around unfair dismissal matters.[71]

S 138 (10) of the LRA[72] instructs commissioners to adhere to these Codes when interpreting the LRA and dealing with arbitration proceedings. Furthermore, the idea behind implementing Codes within a legislative framework is to aid in educating employers and employees in resolving disciplinary issues. However, Benjamin[73] observes that unfortunately, this proposal has been less than successful in simplifying disciplinary procedures by promoting the combination of "soft law"[74] and the Act.[75]

In short, the LRA aimed to establish a labour law administration that met international benchmarks, whilst at the same time codifying a body of jurisprudence[76] and meeting the primary objectives of fair labour relations set out in the Constitution.

## 4. THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (CCMA)

As a juristic independent body, the CCMA, once referred to as a "one-stop-shop,"[77] is the LRA's solution to resolving labour disputes. Its functions include dispute resolution, dispute management, and an institution within the labour arena aimed at providing re-education for employers and employees.[78] The CCMA offers an inexpensive route for the public to bring matters to the table relating to dismissals, trade unions, unfair labour practice as well as interest disputes appearing from collective bargaining.[79] The primary purpose of the CCMA was to set out a method for promoting social justice and fairness in the workplace.[80] This was to be carried

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[71] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No 47. See also CCMA 2015/2016 Annual Report. Report Number 209/2016. CCMA Publications.
[72] The Labour Relations Act, s 138 (10).
[73] Benjamin P, "*Conciliation, Arbitration and Enforcement: The CCMA's Achievements and Challenges,"* (2009) 30 *ILJ* 26 p27.
[74] Ibid.
[75] Ibid.
[76] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No 47 p1.
[77] Explanatory Memorandum to the Labour Relations Act (1995) 16 ILJ 278 p327.
[78] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No 47 p6.
[79] Ibid.
[80] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No 47 p1.

out through ethical and innovative services of the highest quality that are in compliance with the law.[81]

*Carephone v Marcus NO & Others*[82] is a significant case when it comes to identifying the duties of the CCMA and its commissioners as arbiters of an administrative tribunal. Although the test for review established in *Carephone* has been adjusted by *Sidumo v Rustenburg Platinum Mines Ltd & others,*[83] the case remains relevant today when describing the obligations of the CCMA in relation to constitutional rights. According to Froneman DJP, the CCMA Commissioners are obliged to respect the parties' fundamental rights, remain impartial, ensure fairness and remain unprejudiced throughout the arbitration proceedings.[84] By examining and interpreting sections s 136 to 138 of the LRA[85] carefully, the court ensured that the Act complied with these constitutional standards.[86]

Section 138 of the LRA[87] expressly outlines the nature of the commissioners' discretionary powers and the way the proceedings are to be carried out.[88] This section clearly describes that the commissioner must expeditiously and fairly carry out the proceedings whilst addressing the merits of the case and staying within the minimum legal constraints.[89] The whole purpose of these provisions was to ensure flexibility and efficiency throughout the CCMA arbitrations.[90]

Section 115 of the LRA[91] details that the CCMA is given the full discretion to perform functions required for effective dispute resolution and at the same time has the power to delegate these functions.[92] One of the mandatory functions is to resolve all disputes referred for conciliation in terms of the LRA, and to perform the arbitration of those issues referred from conciliation that have the opportunity to be

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[81] Ibid.
[82] [1998] 11 BLLR 1093 (LAC).
[83] 2007 [12] BCLR 1097 (CC).
[84] Ibid.
[85] The Labour Relations Act s 136-138.
[86] *Carephone (Pty) Ltd v Marcus NO & Others* [1998] 11 BLLR 1093 (LAC) para 21-22.
[87] The Labour Relations Act, Act 66 of 1995.
[88] The Labour Relations Act, Act 66 of 1995 s 138.
[89] Benjamin, P "Friend or foe? The impact of judicial decisions on the operation of the CCMA" (2007) 28 *ILJ* 8-9.
[90] Mischke, C (adapted by Brand, J) "Overview of the dispute system," in Brand, J et a1 Labour Dispute Resolution 2 ed (2008) Juta.
[91] The Labour Relations Act, Act 66 of 1995, s 115.
[92] Du Toit D et Godfrey S et Cooper C et al, *"Labour Relations Law: A Comprehensive Guide,"* 6th ed (2015) p119.

arbitrated in terms of the LRA or any other statue.[93] Another function of the CCMA includes the discretion to perform a variety of tasks, including advising parties about the procedures to be followed when referring disputes for conciliation and arbitration, and helping applicants obtain sound and impartial legal advice.[94] Furthermore, the CCMA may "offer to resolve a dispute that had not been referred to the CCMA through conciliation."[95] This provision allows for the services provided by the CCMA to be available to all parties in major disputes.

The drafters of the LRA set out to use arbitration as a binding means to resolve disputes in order to avoid the formal, tedious and costly procedures of litigation. The main purpose accompanying this feature was to reduce industrial action[96] and provide a "legitimate alternative process."[97] Interestingly, prior to public arbitration, there was a means of alternative dispute resolution through private arbitration.[98] The next section aims to describe the process of arbitration when dealing with dismissal disputes through the CCMA.

## 5. ARBITRATION PROCEDURE WHEN DEALING WITH DISMISSAL DISPUTES

Now that the history and background of dispute resolution, as well as the development of one of the LRA's most valuable creations, the CCMA, has been reviewed, an outline of how arbitration is handled by the CCMA during dismissals shall be analysed. Arbitration proceedings are purposefully disconnected from the structure of the courts.[99] The CCMA is not part of the public service despite being financed by the state. Thus, it is clear that the government wishes to acknowledge the independence of the CCMA.[100]

A noteworthy function of the CCMA is arbitration in relation to unfair dismissals issues, which is described in s 191 (5) as follows:

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[93] Ibid.
[94] Du Toit D, Godfrey S, Cooper C et al, *"Labour Relations Law: A Comprehensive Guide,"* 6th ed (2015) p120.
[95] Ibid, p119.
[96] Lewis R & Clark J, *"Employment Rights, Industrial Tribunals and Arbitration: The case for Alternative Dispute Resolution,"* (1993) 33. See also Clark J, *"Arbitration is dismissal disputes in South Africa and the UK,"* (1997) 18 *ILJ* 609.
[97] Ibid.
[98] Explanatory Memorandum to the Labour Relations Act (1995) 16 *ILJ* 278 p328-329.
[99] Explanatory Memorandum to the Labour Relations Act (1995) 16 *ILJ* 278 p328-329.
[100] Ibid.

S 191. (5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved –

(a) the council or the Commission must arbitrate the dispute at the request of the employee if-

(i) the employee has alleged that the reason for dismissal related to the employee's conduct or capacity, unless paragraph (b)(iii) applies;

(ii) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable or the employer provided the employee with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the employee alleges that the contract of employment was terminated for a reason contemplated in section 187;[101]

The CCMA will only arbitrate on a dispute if a commissioner has issued a certificate after conciliation that the dismissal remains unresolved. At this point, the applicant party will sign a LRA Form 7.13[102] and serve the document to the other parties and CCMA within 90 days of when the certificate of outcome was issued.[103] If necessary, the dispute may have to undergo pre-arbitration;[104] following this, the parties may send a request to appoint a senior commissioner. It is imperative that any commissioner assigned to the dispute should remain free from bias.[105]

Additionally, the CCMA has increasingly used the process of con-arb to resolve disputes.[106] As a mix of both conciliation and arbitration, it is a "one sitting process."[107] The procedure starts with conciliation and if the parties cannot agree, the conciliator shifts to arbitration, with the aim to expeditiously deal with the issue in

[101] The Labour Relations Act (LRA), Act 66 of 1995, s 191(5).
[102] Rule 4, Rules for the conduct of proceedings before the CCMA GNR 1448 GG 25515 of 10 October 2003 ('the CCMA Rules').
[103] Van Niekerk A & Smit N, *"Law @work,"* (2015) 3rd ed p452.
[104] Ibid.
[105] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No 47 p19.
[106] Benjamin P, "*Conciliation, Arbitration and Enforcement: The CCMA's Achievements and Challenges,"* (2009) 30 *ILJ* 26 p27.
[107] Bosch, D., Molahlehi, E. & Everett, W. (2004). *The Conciliation and Arbitration Handbook: A Comprehensive Guide to Labour Dispute Resolution Procedures.* Durban: LexisNexis Butterworths.

one day. However, employers tend to object to the dispute being processed as con-arb. In many cases, the objection is made automatically as the referral form to use con-arb gives the employer an option to object without having to provide reasons. If con-arb has been rejected, the ordinary process resumes and the employee will need to refer the dispute to arbitration within 90 days of failing to conciliate the issue.[108]

There is no regimented procedure outlined in the LRA as to how arbitration proceedings should be carried out. In fact, it is entirely at the commissioner's discretion as to how they are conducted. The law merely requires that a dispute be determined "fairly and quickly" while taking cognisance of the "substantial merits of a dispute with a minimum of legal formalities."[109] In *Naraindath v CCMA*,[110] the court described that arbitration procedures should not be a "slavish imitation" of court processes and that commissioners should follow the procedures outlined in the small claims court, which was endorsed by the LAC.[111]

According to s 138 (2) of the LRA, a party is entitled to "give evidence, call witnesses, question the witness of any other party and address any remarks to the commissioner."[112] Benjamin[113] describes the procedure of arbitration as a milder version of a civil trial[114], and states that an arbitrator must decide whether the approach to the arbitration will be carried out as adversarial or inquisitorial.[115] This inevitably led to guidelines which described the appropriate approach to adopt in a particular circumstance. The guidelines stipulate that an inquisitorial technique will often be required if one or both parties are unrepresented or the representative is inexperienced.[116] Labour Court decisions have requested that the CCMA, when conducting arbitration, give clear directions to the parties as to how the proceedings shall be carried out.[117]

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[108] Benjamin P, "*Conciliation, Arbitration and Enforcement: The CCMA's Achievements and Challenges,"* (2009) 30 *ILJ* 26 p27.
[109] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No 47 p21.
[110] (2000) 21 *ILJ* 1151 (LC).
[111] *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO &others* (2007) 28 *ILJ* 2238 (LAC).
[112] The Labour Relations Act s 138 (2).
[113] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No 47 p21.
[114] Ibid.
[115] Ibid.
[116] The Labour Relations Act (LRA), Act 66 of 1995 p21.
[117] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No 47 p22.

The arbitration process is a new hearing which means that the evidence is heard afresh before the arbitrator who will then determine whether the dismissal is fair.[118] During the preliminary stages, the arbitrator must ensure that the parties have been identified and that the preliminary issues have been addressed. If the matter is resolved at this point, then the arbitrator may provide a ruling on the decision together with reasons for the final award.[119] Any request for legal representation will also be handled during the preliminary stage under Rule 25 of the Conduct of Proceedings before the CCMA.[120] The arbitrator will then move on to narrowing the issues, and identify whether there was a fair dismissal in terms of the Code of Good Practice.[121]

The next stage involves the calling of witnesses to whom questions may be asked, followed by arguments. According to part C of the guidelines, the award, accompanied by brief reasons, is decided upon within 14 days after the arbitration process, the time period that mandates the CCMA to hand down the award.[122] When the arbitrator is faced with the procedural fairness of a dismissal, they must have cognizance of item 4 of the Code of Good Practice.[123] Additionally, item 7 addresses substantive fairness in relation to misconduct dismissals, item 9 issues guidelines in cases of dismissal for poor work performance, item 10 lays out incapacity dismissals and item 11 looks at dismissals arising from ill health or injury.[124]

Upon conclusion of the proceedings, the commissioner will make an award which is final and binding upon the parties.[125] Under s 145 of the LRA,[126] these decisions are subject to review at the Labour Court within six weeks from the date on which the award was served upon the applicant. This review may only be made based on the misconduct of an arbitrator, gross irregularities in the arbitration proceeding or if the arbitrator was acting in excess of his or her powers.[127] The

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[118] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No 47 p21.
[119] The Labour Relations Act (LRA) s 138 (7) (a).
[120] Rule 25, Rules for the conduct of proceedings before the CCMA GNR 1448 GG 25515 of 10 October 2003 ('the CCMA Rules').
[121] Code of Good Practice: Dismissal (Schedule 8 to the LRA).
[122] The Labour Relations Act (LRA), Act 66 of 1995 s 138 (7).
[123] Code of Good Practice: Dismissal (Schedule 8 to the LRA).
[124] Code of Good Practice: Dismissal (Schedule 8 to the LRA) item 7 -11.
[125] The Labour Relations Act, Act 66 of 1995 s 142A.
[126] The Labour Relations Act, Act 66 of 1995 s 145.
[127] The Labour Relations Act, Act 66 of 1995 s 143 (2).

grounds for reviews are not as narrow as s 145, which has been heavily supplemented by the decision in *Sidumo,*[128] addressed in detail in chapter three.

Therefore, it appears that arbitration processes intend to endorse flexibility and simplicity in their steps to resolve dismissal disputes. The combination of the Code of Good Practice[129] and the LRA[130] provides a coherent method of undertaking dismissal arbitration hearings. The Code stipulates how evidence should be analysed and how awards should be granted.[131] Furthermore, it also outlines the pertinent legal principles when determining whether a dismissal is procedurally and substantively fair.[132]

## 6. CONCLUSION

With the implementation of the LRA, it is clear that there is an aim to simplify the resolution procedures in South Africa. This chapter has outlined the growth of the dispute resolution system in South Africa prior to the LRA, up until the creation of the CCMA. The development of dispute resolution, especially in dismissal cases, has provided employers and employees more avenues to express their concerns. Arbitration during dismissals directs the actions of parties toward a process of mutual fairness and accountability.[133] The emphasis in dismissal disputes is on the CCMA, its development and its means of resolving matters in the most effective way without resorting to litigation. The use of arbitration as a means of resolving dismissals allows the court more time to deal with issues such as discriminatory practice and retrenchments. Finally, the aim of creating the CCMA was to offer a user-friendly method to resolve issues, especially through arbitration techniques and procedures.

The next chapter will provide a detailed discussion evaluating the CCMA's action in dismissals in order to address its successes and shortcomings.

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[128] 2007 [12] BCLR 1097 (CC).
[129] Code of Good Practice: Dismissal (Schedule 8 to the LRA).
[130] The Labour Relations Act, Act 66 of 1995
[131] Steenkamp A & Bosch C, *"Labour dispute resolution under the 1995 LRA: Problems, pitfalls and potential,"* (2012) Acta Juridica p129.
[132] Ibid.
[133] Coulson R, *"Labour Arbitration: What you need to know*," 5th ed (2003) (JurisNet).

## CHAPTER THREE

## SUCCESSES AND SHORTCOMINGS OF THE CCMA IN RESOLVING DISMISSAL DISPUTES

### 1. INTRODUCTION

The creation of the CCMA has resulted in an exceptional level of contact between justice and employees, especially for those of whom were unfairly dismissed.[134] The organisation was established with the aim of providing accessible, inexpensive and rapid dispute resolution in the most common categories of labour disputes. To truly understand the development of the CCMA, it is essential to assess its successes and shortcomings since its establishment. The CCMA has been given legislative authorisation to resolve dismissal disputes using a method that aims to avoid the detail and delay that are dominant features of the court adjudication system.[135] This chapter will outline how the CCMA has faced numerous successes and shortcomings in resolving dismissal disputes since its establishment.

The first part of this chapter aims to assess the successes of the CCMA in its role of efficiently resolving dismissal disputes through arbitration. During the formation of the CCMA, the strategy was to shift from the conventional method of establishing specialist labour tribunals towards increasing accessibility and efficiency. This assessment will be achieved by drawing on information recorded in the Annual Report[136] of the CCMA as well as other considerable resources. The second part of this chapter will focus on the shortcomings and challenges the CCMA faces, particularly expanding on how far the CCMA has met the objectives laid out in the Explanatory Memorandum of 1995.[137]

Since the intention of the drafters was to establish an organisation that could provide accessible, informal and efficient dispute resolution, these criteria will serve as the indicators in evaluating the achievements and challenges of the CCMA.

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[134] Benjamin P, "Conciliation, Arbitration and Enforcement: The CCMA's Achievement and Challenges (2009) 30 *ILJ* 26.
[135] Ibid.
[136] CCMA. (2005). 2015/2016 Annual Report. Report Number 209/2016. CCMA Publications.
[137] Explanatory Memorandum to the Labour Relations Act (1995) 16 *ILJ* 278.

Furthermore, since individuals have the opportunity to rate the service of the CCMA, this allows for an assessment of the quality of the system.[138]

## *2.* SUCCESSES OF CCMA IN RESOLVING DISMISSAL DISPUTES

### *2.1 Efficiency*

An efficient dispute resolution system is one that is swift in resolving disputes with high settlement rates in a short period of time.[139] Conversely, systems that are sluggish and delay in producing results are inefficient.[140] When it comes to the CCMA, efficiency with respect to arbitrations and conciliations relates to the time it takes the CCMA to conclude these proceedings. The effective resolution of disputes[141] is paramount in achieving the objectives set out by the LRA. CCMA commissioners are obliged to take both parties' interests into account when resolving the dismissal dispute. The LRA stipulates[142] that the CCMA should arbitrate disputes within 90 days, while the CCMA sets a tighter internal deadline of 60 days.[143] Therefore, the CCMA must aim to complete arbitrations within 60 days after the request for arbitration.[144]

In comparison to the time it takes for court proceedings to be carried out, it is clear the CCMA's time limit promotes efficiency. Moreover, the arbitrator is required to make an award with reasons, within 14 days of the hearing.[145] Despite the influx of cases referred to the CCMA, the goal of hosting arbitrations rapidly has been achieved, as the average time taken to conclude an arbitration hearing is 70 days from the date the dispute was initially referred for conciliation.[146] During its

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[138] Budd, J. & Colvin, A, *"Improved Metrics for Workplace Dispute Resolution Procedures: Efficiency, Equity, and Voice,*" (2008) Industrial Relations, 47(3), 460-479.
[139] Ibid.
[140] Budd, J. & Colvin, A, *"Improved Metrics for Workplace Dispute Resolution Procedures: Efficiency, Equity, and Voice,*" (2008) Industrial Relations, 47(3), 460-479.
[141] The Labour Relations Act 66 of 1995, s 1 (d)(iv).
[142] The Labour Relations Act 66 of 1995, s136 (1)(b).
[143] Bhorat, H., Pauw, K. & Mncube, L. "*Understanding the Efficiency and Effectiveness of the Dispute Resolution System in South Africa: An Analysis of CCMA Data"* Development Policy Research Unit (2007).
[144] Ibid.
[145] The Labour Relations Act 66 of 1995, s138 (7).
[146] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No. 47 p20.

formative years, the CCMA's arbitration cases account for 30 per cent of the cases processed.[147]

It is also important to note that the number of arbitrations heard increased from the previous year by nine per cent, based on the annual CCMA report of 2016.[148] [149] The late awards submitted by commissioners decreased by a significant 167 per cent, and this area continues to be controlled. Furthermore, from the total 17 333 awards rendered, 29 were sent late to the parties, a reduction of 93 per cent from the previous year. This clearly shows the CCMA's increasing expeditiousness in its case management.[150]

### *2.2 Accessibility*

Accessibility is the ability to effectively access redress systems in order to gain unbiased outcomes.[151] Accessibility is an important ingredient in an effective dispute resolution system. CCMA arbitration proceedings are designed to be an accessible and inexpensive route for workers at the point of entry.[152] Leeds and Wöcke[153] find the CCMA accessible due to the excessive number of disputes referred to the CCMA and the high number of out-of-jurisdiction cases.[154] The increase in the number of claims that are made in time, and the fact that employees can lodge claims by reporting to the CCMA offices where the relevant personnel can assist them to complete the referral forms prove the process's simplicity.[155] This means that cost, availability of centres, qualifications and any other personal skills will not be a barrier to accessing the dispute resolution institute.[156] The CCMA has established

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[147] CCMA. (2008). Annual Report 2007/2008. Report Number 55/2008. CCMA Publications. Johannesburg.
[148] CCMA. 2015/2016 Annual Report. Report Number 209/2016. CCMA Publications.
[149] CCMA. 2015/2016 Annual Report. Report Number 209/2016. CCMA Publications.
[150] Ibid, p123.
[151] Genn, H., Lever, B., Gray, L. & Balmer, N. (2006). Tribunals for diverse users. Research report. DCA Research Series. Vol. 1. London: Department for Constitutional Affairs.
[152] Brand J, "*CCMA: Achievements and Challenges - Lessons from the First Three Years*" (2000) 21 *ILJ* 77 p78.
[153] Leeds, C. & Wöcke, A,*"Methods of reducing the referral of frivolous cases to the CCMA. South African Journal of Labour Relations," (2009)* 33(1), 28-44.
[154] Ibid.
[155] Du Toit D et Godfrey S et Cooper C et Giles G et Cohen T et Conradie B et Steenkamp A, *"Labour Relations Law: A Comprehensive Guide,*" 6th ed (2015) p 135.
[156] Brand J, "CCMA: Achievements and Challenges - Lessons from the First Three Years (2000) 21 ILJ 77 p79.

over 20 regional offices[157] around the country in order to make the institution easily available to parties thereby achieving accessibility.

Accessibility has also been promoted through the CCMA's limitation of legal representation. This factor is beneficial when aiming to reduce time and costs. During dismissal arbitration, legal representation is forbidden unless agreed upon or permitted by an arbitrator based on either public interest or the complexity in which the question of law was raised.[158] Legal practitioners are restricted during dismissal arbitration due to the perception that lawyers are pricey and legalistic, which go against the tenets of the CCMA.[159]

Rule 25 of the Rules for the Conduct of Proceedings before the CCMA[160] stipulates that legal representation during arbitration is limited. This is the case during unfair dismissal disputes relating to misconduct or incapacity.[161] Rule 25(c) (1) and (2)[162] states that legal representation will only be allowed under the following circumstances:

> **Rule 25 (c)** (1) the commissioner and all the other parties consent;
>
> (2) the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering:
>
> (a) the nature of the questions of law raised by the dispute;
>
> (b) the complexity of the dispute;
>
> (c) the public interest; and
>
> (d) the comparative ability of the opposing parties or their representatives to deal with the dispute.[163]

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[157] "CCMA," < http://www.ccma.org.za/About-Us/Regional-Offices> last accessed 28th October 2017.
[158] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No. 47 p22.
[159] Van Niekerk A & Smit N, *"Law @work,"* (2015) 3rd ed p456.
[160] Rule 25, Rules for the conduct of proceedings before the CCMA GNR 1448 GG 25515 of 10 October 2003 ('the CCMA Rules').
[161] Van Niekerk A & Smit N, *"Law @work,"* (2015) 3rd ed p456.
[162] Rule 25, Rules for the conduct of proceedings before the CCMA GNR 1448 GG 25515 of 10 October 2003 ('the CCMA Rules').
[163] Ibid.

Despite Rule 25, there has been uncertainty about representation in dismissals. In *Netherburn Engineering CC t/a Netherburn Ceramics Mudau NO & others*,[164] the constitutional right to be legally represented in arbitration proceedings was addressed, but it was held that in terms of common law, no such absolute right has been created.[165] The Supreme Court of Appeal in *CCMA v The Law Society of Northern Provinces* confirmed this judgment,[166] whereby the court held that the rule was sufficiently flexible to permit legal representation.[167] According to Benjamin,[168] employers and employees only have legal representation in approximately 15 per cent of dismissal arbitrations in 2013. The CCMA clearly wishes to reduce the risk of the arbitration process from becoming lengthy and drawn out which could often be the case when representatives are involved in the process.

Another method whereby the CCMA has proved its accessibility is through its free service[169] towards the public when referring unfair dismissal disputes as well as other unfair labour practices. Costs often serve as a deterrent when employees wish to raise disputes; fortunately, the CCMA has resolved this issue. However, the CCMA commissioner may make cost awards, but they are very rare and are usually reserved for exceptional situations.[170]

### *2.3 Informality*

The next crucial criterion by which the CCMA can be measured is its informality. This factor is important, as it is a clear contrast from the stringency of court proceedings. Genn[171] describes informality as a dispute resolution institution in which the procedures are so simple to grasp that an applicant can start a case, prepare for submission and present at a hearing by themselves.[172] The whole process is meant

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[164] [2009] 4 BLLR 299 (LAC).
[165] Ibid.
[166] [2013] 34 ILJ 2779 (SCA).
[167] Ibid.
[168] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No. 47 p23.
[169] Brand J, *"CCMA: Achievements and Challenges - Lessons from the First Three Years,"* (2000) 21 *ILJ* 77 p78.
[170] The Labour Relations Act 66 of 1995, s138 (10).
[171] Genn, H., Lever, B., Gray, L. & Balmer, N. (2006). Tribunals for diverse users. Research report. DCA Research Series. Vol. 1. London: Department for Constitutional Affairs.
[172] Ibid.

to radically reduce the formalities of the conventional court process, involving less dense technicalities, less complications and limited legal representation.[173]

The absence of complex details is successful in ensuring that there are fewer barriers to the system. The only condition required for bringing a dispute to the CCMA is that an applicant submit two forms in which the dispute is laid out in general terms.[174] Section 138 of the LRA outlines the manner in which arbitration proceedings are to be held.[175] Moreover, the legislature's advocacy for flexibility in dismissal issues is emphasised in the enactment of its "soft law" instrument, the Code of Good Practice.[176]

### *2.3.1 Role of the courts*

Appeals against the decisions of arbitrators are not allowed but they are subject to judicial review by the Labour Court which is then, in turn, subject to appeal by the Labour Appeal Court and the Constitutional Court.[177] However, parties afflicted by a commissioner's decisions are limited to instituting review proceedings based on the grounds set out in s 145 of the LRA.[178] The narrow scope of these reasons, which bear resemblance to those in private arbitration awards under s 33 of the Arbitration Act,[179] aim to discourage reviews of CCMA awards due to the technicalities of court practices.[180] Arbitration reviews are held under the same pressures as arbitration proceedings, in that a strict time limit of six weeks is set for a review application to be filed.[181] The *raisons d'etre* is to prevent unnecessary delays and to coincide with the initial aims of approachability and haste, thereby upholding an effective dispute resolution system.

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[173] Roberts, S.A. & Palmer, M, "*Dispute Processes: ADR and the Primary Forms of Decision Making,"* (2005) Cambridge, UK: Cambridge University Press. See also *Naraindath v CCMA & others* (2000) 21 *ILJ* 1151 (LC).
[174] Ibid.
[175] The Labour Relations Act 66 of 1995, s 138 (1) – (9).
[176] Code of Good Practice: Dismissal (Schedule 8 to the LRA).
[177] *Chevron Engineering (Pty) Ltd v Nkambule & others* [2003] 7 BLLR 631 (SCA). See also *NUMSA & others v Fry's Metals (Pty) Ltd* [2005] 5 BLLR 430 (SCA).
[178] *Herholdt v Nedbank Ltd (congress of South African Trade Unions as amicus curiae)* [2013] 11 BLLR 1074 (SCA).
[179] Arbitration Act 42 of 1965.
[180] Benjamin, P, *"Friend or Foe: The Impact of Judicial Decisions on the Operation of the CCMA,"*(2007) *ILJ*,28, 1-42.
[181] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No. 47 p24.

## 3. SHORTCOMINGS OF CCMA IN RESOLVING DISMISSAL DISPUTES

### *3.1 Efficiency*

It is important to remember that despite the high standards set by the CCMA in achieving its objectives, failures are inevitable and every developing system is bound to suffer from setbacks. The way a system deals with these setbacks determines how far it is able to adapt to any forthcoming development to survive. Ironically, an example of this is delays; in arbitration, the CCMA notes that in order to deal with cases efficiently, commissioners are usually obligated to do up to three arbitrations per day.[182]

This obligation places both the commissioner and the management under a great deal of pressure to deal with the exorbitant amount of cases, and this may affect the quality of administration. The CCMA staff may often feel overburdened with cases and this could lead to inefficiencies, unnecessary delays and an extensive waste of resources.[183] This obstacle in arbitration proceedings proves that unless screening is properly undertaken, a negative perception of the institution may arise amongst users.[184]

Another shortcoming in the CCMA's efficiency is when dealing with review matters. Benjamin notes that parties that have access to resources may institute appeal proceedings for tactical delaying purposes despite having no intention of pursuing the issue.[185] According to Benjamin, 10 to 15 per cent of arbitration awards are sent for review proceedings.[186] Statistics show that in 2006, it took approximately 23 months from the date of the arbitration award for the review to be heard and a further three months for the judgment to be delivered.[187]

Reviews should be carried out based on the requirements laid out in s 145[188] without looking at the merits of the case. Unfortunately, it has proven difficult for the courts to adhere to this principle and they often overstep this boundary by engaging

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[182] Levy, A & Venter, T, "*Research findings: CCMA, bargaining councils and private cases," Tokiso Review 2006/7(2006)* Johannesburg: Tokiso Dispute Settlement, p80.
[183] Ibid, p80.
[184] Brand J, *"CCMA: Achievements and Challenges - Lessons from the First Three Years,"* (2000) 21 *ILJ* 77 p90.
[185] Ibid p 42.
[186] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No. 47 p24.
[187] Ibid.
[188] The Labour Relations Act 66 of 1995, s 145.

in the merits.[189] In the case of *Herholdt*,[190] the court suggested that to permit reviews rather than appeals has not succeeded in an efficient dispute resolution system and that an appeal system may prove less complex and more determinative of the issues.[191] However, the court has somewhat resolved this issue through the enforcement of the reasonable test as laid out in *Sidumo & Another v Rustenburg Platinum Mines Ltd & others*,[192] which is a much broader and complex test.[193] The Court held that the correct standard of a review of a commissioner's award or ruling is the reasonableness standard and an administrative decision can only be reviewable in a situation whereby a reasonable decision maker, based on the content before them, could not reach that decision.[194]

### *3.2 Accessibility*

Although having a free and easily accessible system proves highly beneficial to employees wishing to have their cases heard, severe difficulties arise for the CCMA due to its wide scope of jurisdiction and their lack of human and financial resources.[195] The lack of legal representation may provide a cheaper and easier way of dealing with dismissal arbitration, but this approach fails to identify the valuable contribution lawyers can make during dismissal arbitrations, as they can often be very sympathetic to simple processes.[196]

The idea of a free dispute resolution service remains complex, as nothing is ever truly free of charge; there is always a price. The influx of cases to the CCMA has resulted in a shortage of resources and has placed the commissioners under enormous pressure.[197] The case management staff are often too busy and poorly

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[189] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Medition and Arbitration (CCMA)"* (2013) *ILO* No. 47 p25.
[190] [2013] 11 BLLR 1074 (SCA).
[191] Ibid.
[192] [2007] 12 BLLR 1097 (CC).
[193] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No. 47 p25.
[194] Ibid.
[195] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No. 47 p 25 -26.
[196] Ibid.
[197] Levy, A & Venter, T, *"Research findings: CCMA, bargaining councils and private cases," Tokiso Review 2006/7(2006)* Johannesburg: Tokiso Dispute Settlement, 5-42.
p82.

skilled to assist workers in organising the disputes into the correct processes. This results in unnecessary technical issues, delays and a substantial waste of resources.[198]

*3.3 Informality*

One of the main challenges the CCMA faces is dealing with s 138 of the LRA,[199] as this provision tends to portray a contradiction between s 138(1) and s 138(2), concerning whether the commissioner is to uphold an inquisitorial or adversarial approach. The section reads as follows:

> **s 138** (1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.
>
> (2) Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner.[200]

Despite the provision claiming that the way in which the proceedings are carried out is up to the discretion of the commissioner,[201] none of the CCMA public documents stipulate this; instead, they represent the rights as absolute.[202] Whilst this issue was resolved with the implementation of the CCMA Guidelines,[203] it is apparent that the commissioner's discretion is capped.[204] This point will be addressed in more detail in chapter six.

Whilst the lack of formality makes the infrastructure appealing when dealing with dismissals, there remains ambiguity over what approach to adopt. According to Benjamin, the wording "fairly and quickly" set out in s 138 emphasises the need to meet both requirements of fairness and expeditiousness whilst upholding the rights

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[198] Ibid.
[199] The Labour Relations Act 66 of 1995, s 138.
[200] Ibid.
[201] Clark J, *"Arbitration is dismissal disputes in South Africa and the UK,"* (1997) 18 *ILJ* 609.
[202] Ibid.
[203] CCMA Guidelines: Misconduct Arbitration GenN 602 GG 34573 of 2 September 2011.
[204] Ibid.

of the parties. Despite the inquisitorial tactics laid out by the CCMA, it is evident that commissioners conduct arbitrations in an adversarial manner so as to adopt the safer approach similar to the court processes.[205]

One of the main motivators behind the formation of the CCMA was IMSSA. Whilst IMSSA's processes may have seemed practical at first, they failed to consider the Constitutional rights required when undertaking arbitration proceedings. Every CCMA applicant has a constitutional right to "fair labour practice"[206] and more importantly to "just administrative action."[207] Unfortunately, the requirement of carrying out these rights under the inquisitorial approach often seems unsuitable and will require the adoption of an adversarial approach to aid in exercising these rights.

Dealing with dismissal disputes may prove to be more complex for parties than it appears. The CCMA has been criticised in the past for its inconsistency regarding the approach to procedural fairness.[208] It was initially proposed that the Code of Good Practice on Dismissal would be regularly updated by NEDLAC. Unfortunately, this has not occurred, and despite the CCMA Governing Body's published guidelines for arbitrators, there is still a lack of clarity when it comes to the arbitration procedures when employees from small employers are dismissed. [209]

Finally, the most significant issue is that, on the surface, the CCMA appears to benefit big employers more than smaller ones. In fact, small employers bring dispute claims more frequently to the CCMA than large employers.[210] Unfortunately, it is these small and unskilled businesses that suffer most from the shortcomings of the CCMA,[211] and this often compels small firms to resort to the courts first as opposed to the CCMA.[212] Thus, it is clear that whilst the CCMA remains accepted

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[205] Benjamin, P, *"Friend or Foe: The Impact of Judicial Decisions on the Operation of the CCMA,"*(2007) *ILJ*, 28, 1-42
[206] The Constitution of the Republic of South Africa, s 23.
[207] The Constitution of the Republic of South Africa, s 33.
[208] Ibid.
[209] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No. 47 p25.
[210] Ibid.
[211] Ibid
[212] Brand J, "*CCMA: Achievements and Challenges - Lessons from the First Three Years*" (2000) 21 *ILJ* 77 p81.

for its advantages surrounding its processes, there is a lack of uniformity in its effect.[213]

## 4. CONCLUSION

The objectives of labour dispute resolution include efficiency, accessibility and informality. According to Steenkamp and Bosch,[214] the *raison d'etre* for these are because employers and employees cannot afford delays and they may not possess the necessary knowledge to tackle these lengthy legal processes.[215] Further, it is essential for labour dispute resolution institutions to maintain a balance between the rights and interests of both parties while maintaining relatively healthy labour relations.

The simplicity with which a party may bring a dismissal dispute to the CCMA as well as its high referral rate accounts for the its extensive caseload. As a cost-free service, the CCMA aims to provide an answer to the question of how labour dispute resolutions can be made accessible and efficient.[216] In comparison to conventional litigation and court procedures, the CCMA has enjoyed a great level of success since its establishment, especially when resolving disputes as promptly as possible. This has resulted in a slight shift in the level of disputes brought by employees that would have otherwise not had the resources or time to carry out these applications.[217]

The advantages of the CCMA include its lack of technicalities and informality in carrying out its functions. However, this approachability is accompanied with its flaws, as the extraordinary number of cases entered leads to a shortage of financial and human resources. However, the fact that the CCMA has limited resources at its disposal and is still able to carry out and resolve disputes within the time limits further highlights its success.

This chapter outlined the successes and shortcomings associated with the CCMA when dealing with dismissals in comparison to conventional courts. The

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[213] Brand J, "*CCMA: Achievements and Challenges - Lessons from the First Three Years*" (2000) 21 *ILJ* 77 p81.
[214] Steenkamp A & Bosch C, *"Labour dispute resolution under the 1995 LRA: Problems, pitfalls and potential,"* (2012) Acta Juridica p121.
[215] Ibid.
[216] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No. 47 p46.
[217] Ibid.

CCMA has succeeded in providing improved and expedited access to dispute resolution services for employees who generally would not have otherwise had the means to bring legal disputes against employers' decisions. This success can be attributed to numerous factors, including simplified referral forms, the absence of formal legal pleadings and restrictions on legal representation in dismissal disputes.[218] Unfortunately, the CCMA's success in lowering the barriers for entry to dispute resolution has resulting in commissioners dealing with a considerably larger caseload than originally expected. Due to this, it is evident that the quality of the service provided must be questioned. This will be addressed in more detail in the recommendations chapter.

[218] Benjamin P, "*Beyond Dispute Resolution: The Evolving Role of the Commission for Conciliation, Mediation & Arbitration*," (2014) 35 *ILJ* 1

# CHAPTER FOUR

# THE ALTERNATIVE DISPUTE RESOLUTION SYSTEM OF ENGLAND

## 1. INTRODUCTION

The use of arbitration when resolving dismissal disputes has not only been an issue for debate in South Africa, but in England as well. Both countries have adopted legislation and mechanisms to facilitate alternative dispute resolution in dismissal disputes. An analysis of the system of South Africa has been provided and thus, it is time to turn towards the jurisdiction of England. Currently, England has a twofold method of dealing with employment disputes: the "Advisory, Conciliation and Arbitration Service (ACAS)" for conciliation and arbitration, and adjudication by the Employment Tribunal (ET).[219]

In the late 1950's, dismissal disputes were governed by the British legal system through the common law concept of contract law.[220] Due to the rise of growing inequalities between the "master and servant"[221] relationship, the bargaining positions between parties were regulated in different ways. It is important to note that prior to the 1970's, the United Kingdom (UK) believed in a collective "laissez-faire"[222] approach, whereby an employer and employee would interact through an agreement to regulate their issues. After a shift in the political environment, the situation evolved as the government faced immense pressure over the protection of employees against unfair dismissals.[223]

In order to assess how far England has come since the implementation of these institutions, it is necessary to adopt a similar analysis as carried out in the previous chapters. Therefore, this chapter provides an analysis of the employment arbitration in England and engages in the debates about the substantive criteria and procedure applied during employment arbitrations.

The first step is to summarise the history of dismissal dispute resolution in England. From here, an overview of the relevant governing law will be given

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[219] This institute was created by the Employment Protection Act 1975 (EPA) in addition to the option of the Industrial Relations Act of 1971 in some disputes.
[220] *Dismissal Procedures*, 80 Int'l Lab. REV 347 (1959).
[221] Leonard Rico, *"Legislating Against Unfair Dismissal: Implications from British Experience*," 8 Berkley. J. EMP & Lab. L. (1986) 547.
[222] P Davies & M Freedland, "*Kahn-Freund's Labour and the Law*," (1983) 12.
[223] Leonard Rico, *"Legislating Against Unfair Dismissal: Implications from British Experience*," 8 Berkley. J. EMP & Lab. L. (1986) 549.

including the Industrial Relations Act of 1971,[224] which was repealed by the Employment Protection Consolidation Act of 1987 and the Trade Union and Labour Relations Consolidation Act (TULRCA) of 1992.[225] However, for the purposes of this chapter, the Employment Rights (Dispute Resolution) Act of 1999 (ER(DRA)),[226] which deals with collective bargaining and dispute resolution settlements, and the Employment Act of 2008 (EA)[227] will be used to outline the dispute resolution procedure. The lack of a codified Constitution in England, as well as the adoption of ACAS and the discussion it raises in relation to dismissals will be addressed, followed by the arbitration procedure when it comes to these disputes.

## 2. HISTORY OF DISPUTE RESOLUTION IN ENGLAND

When the Industrial Relations Act[228] came into force, it gave the employment tribunals jurisdiction to hear claims of unfair dismissal,[229] which has since expanded to a broad range of employment matters. The most pressing matters that were presented in most of the employment tribunal applications were the unfair dismissal complaints.[230] This was a cause of concern for the then Conservative government.[231] Additionally, an increase in the caseload of industrial tribunals and the complexity of the law meant that the objectives originally laid out by the tribunal were not being met.[232]

The then Department of Employment's Green Paper[233] reviewed the operations of the tribunals and aimed to resolve these issues. A popular suggestion, which was made into reality, was the voluntary arbitration scheme as an alternative to employment tribunals.[234] The implementation of the Woolf reforms, suggested by Lord Woolf, contributed to the unfair dismissal arbitral route, as it stipulated that

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[224] Industrial Relations Act 1971.
[225] Trade Union and Labour Relations (Consolidation) Act 1992.
[226] Employment Rights (Dispute Resolution) Act of 1999.
[227] Employment Act of 2008.
[228] Industrial Relations Act 1971.
[229] Bennet, "*Montana's Employment Protection; A Comparative Critique of Montana's Wrongful Discharge from the Employment Act in light of the United Kingdom's Unfair Dismissal Law*" 118.
[230] Leonard Rico, *"Legislating Against Unfair Dismissal: Implications from British Experience*," 8 Berkley. J. EMP & Lab. L. (1986) 549.
[231] Hardy et al, "*ADR in Employment Law*," 1st ed, Cavendish Publishing (2003) 2.
[232] Ibid.
[233] *Resolving Employment Rights Disputes; Options for Reform*, Cm 2709, December 1994, London: HMSO.
[234] Ibid.

court proceedings would be a last resort when resolving disputes.[235] The new strategy consisted of a voluntary referral to ACAS for the arbitration of unfair dismissal issues in order to reduce the tribunals' caseload. With the success of this approach, it wasn't long after that it was enacted in the form of the ERA of 1998.[236]

It was held that the government's role in dismissals should be limited to the provision of information, education and quality control.[237] In 1999, this was discussed further in the Lord Chancellor's Department Discussion Paper on alternative dispute resolution.[238] This paper established that alternative dispute resolution was suitable in situations surrounding complex and technical issues.[239] The new section, section 212A of the Trade Union and Labour Relations 1992,[240] gave rise to the ACAS Arbitration Scheme[241] which aimed to provide employers and employees the option of legally enforceable arbitral dispute resolution by tribunals. The scheme came into force in 2001, but unfortunately had little effect due to the low uptake by employers and employees.[242]

This alarmed the government and they soon published a paper aimed at resolving these teething problems, which they were able to amend in the EA.[243] The EA introduced the three-step[244] statutory dispute resolution processes, which were made obligatory for all employers. Unfortunately, this incentive still failed to reduce the tribunals' caseload and it was at this stage that the Gibbons Review recommended an entire repeal of statutory procedures.[245] Gibbons felt the best way to resolve any dismissal issues was through alternative dispute resolution.[246]

The use of arbitration in dismissal dispute resolution in England has been a matter of political and legal debate over the years. The shift from tribunals to alternative dispute resolution resulted in numerous significant changes in English

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[235] Hardy et al, "*ADR in Employment Law,"* 1st ed, Cavendish Publishing (2003) 2.
[236] Employment Rights (Dispute Resolution) Act of 1999.
[237] Hardy et al, "*ADR in Employment Law*," 1st ed, Cavendish Publishing (2003) 3.
[238] Ibid.
[239] Hardy et al, "*ADR in Employment Law*," 1st ed, Cavendish Publishing (2003) 3.
[240] Trade Union and Labour Relations (Consolidation) Act 1992.
[241] Clark J, "*Adversarial and Investigative Approaches to the Arbitral Resolution of Dismissal Disputes: A Comparison of South Africa and the UK*," ILJ Vol 28, no4 (1999) p321.
[242] ACAS Arbitration Scheme (England and Wales) Order 2001, SI 2001/1185.
[243] DTI, Routes to Resolution: Improving Dispute Resolution in Britain (2001).
[244] Sanders A, "*Part One of the Employment Act 2008: "Better" Dispute Resolution*?" *ILJ* Vol 38 (2009) p34.
[245] Ibid.
[246] Ibid.

history. The government was clearly alarmed by the growing caseload upon tribunals and felt it was necessary to implement changes to the way in which unfair dismissals were resolved. The ACAS Arbitration Scheme was one of the crucial changes. In order to evaluate what legislation has led to certain changes, an overview of the statutory measures governing dispute resolution will be presented in the next section.

## 3. LAWS GOVERNING DISPUTE RESOLUTION

In the previous chapters, an analysis was conducted on the ways in which relevant statutory instruments played a crucial role in the formation of dispute resolution laws in South Africa. England has a different set of instruments which have aided in establishing law to protect employees from unfair dismissals. It must be remembered that England does not hold a codified Constitution, so any search for the protection of employees' rights would be in Employment law. The legislative framework aimed to make several amendments to the existing framework surrounding tribunal procedures and in doing so, offered more options for employees to resolve their disputes.

### *3.1 Arbitration Act 1996*

Although the first Arbitration Act was enacted in 1697 and consolidated in 1889, it was only after the consolidation of the Arbitration Act 1950[247] did the interest in alternative dispute resolution grow.[248] In fact, this Act[249] allowed international arbitration to form under the Geneva Convention, which was expanded to include the New York Convention of 1975.[250] However, the main motive for arbitration as an alternative to dispute resolution came after the Mustill Committee enforced the newly formed Arbitration Act 1996.[251] The Arbitration Act 1996[252] was intended to be a comprehensive legal statement for England, Wales and Northern Ireland, providing a route for efficient and cost effective dispute resolution.[253]

The Act was divided into four sections, each setting out the necessary schedules and principles to guide the proceedings during arbitration,[254] the seat of

[247] Arbitration Act 1950.
[248] Hardy et al, "*ADR in Employment Law*," 1st ed, Cavendish Publishing (2003) 5.
[249] Arbitration Act 1950.
[250] New York Convention of 1975.
[251] Hardy et al, "*ADR in Employment Law*," 1st ed, Cavendish Publishing (2003) 5.
[252] Arbitration Act 1996.
[253] Hardy et al, "*ADR in Employment Law*," 1st ed, Cavendish Publishing (2003) 5.
[254] Ibid.

arbitration[255] and other general provisions relating to arbitration.[256] Since the enactment of the Act, there has been substantial development in the employment sector of the applicability of alternative dispute resolution.[257] This growth in alternative dispute resolution led to the proposal that ACAS should implement a scheme specializing in unfair dismissal claims, which was enforced through the ER(DR)A.[258]

### *3.2 Employment Rights Act*

As one of the first few pieces of legislation that provided dispute resolution regulation, this Act[259] aimed to deal with collective bargaining and how to conduct disciplinary hearings. When it comes to dismissals, section 94[260] describes that an employee has the right not to be unfairly dismissed by his employer.[261] Furthermore, section 98 (1) (b) states that there must be a fair reason for a dismissal, which must be substantial or relating to "conduct, redundancy, contravention of statute…"[262] Thus, any dismissal cannot be carried out at will but rather for a reason clearly specified in the statute. This is necessary to balance the rights of the employer and the employee. However, this Act does not go into the details of what is required when it comes to dispute resolution. Thus, another instrument was created to specify the changes to the then Arbitration Act's[263] procedures.

### *3.3 Employment Rights (Dispute Resolution) Act*

The ER(DR)A made several changes to employment tribunal procedures, but more importantly, it created a scheme for ACAS arbitration for unfair dismissal claims.[264] This act was introduced by the House of Lords with the intention of reducing the increasing delays caused by the employment tribunal's high caseload.[265] The main objective of this statute was to allow ACAS, if the parties agree, to arbitrate and hear

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[255] Arbitration Act 1996, section 3.
[256] Arbitration Act 1996, section 4.
[257] Hardy et al, "*ADR in Employment Law*," 1st ed, Cavendish Publishing (2003) 6.
[258] Employment Rights (Dispute Resolution) Act of 1998.
[259] Employment Rights Act 1996.
[260] Employment Rights Act 1996, section 94.
[261] Employment Rights Act 1996, section 94.
[262] Employment Rights Act 1996, section 98 (2) (a) – (d).
[263] Arbitration Act 1996.
[264] Employment Rights (Dispute Resolution) Act of 1998, section 7.
[265] Earnshaw J & Hardy S, "*Assessing an Arbitral Route for Unfair Dismissal*," *ILJ* Vol 30 (2001) 289.

any unfair dismissal dispute.[266] This is clearly outlined in section 7 of the Act,[267] whereby ACAS was encouraged to create a scheme with an alternative approach to the traditional employment tribunal process when it came to resolving disputes. Additionally, this Act enabled the Secretary of State to allow arbitration for other types of claims. This role is quite different compared to ACAS's previous roles; however, the Act intends for ACAS to operate the new role alongside its old role of conciliating and settling disputes.[268]

### *3.4 Employment Act 24 of 2008*

This Act expands on the dispute resolution procedure and the disciplinary procedure. This statute was originally referred to as the "Employment Simplification Bill"[269], and the government's intention behind this statute was to introduce a simple three-step process that all parties in an employment dispute were bound to follow, or else face financial penalties if the dispute reached the tribunal.[270] Unfortunately, after this incentive was implemented, the cracks began to show as tribunal numbers were not reducing.[271] It was at this point that the Gibbons report[272] suggested a complete repeal of the statutory dispute resolution procedure.

Gibbons identified two contrasting perspectives on the statutory dismissal and disciplinary procedures (SDDPs). Firstly, the use of SDDPs would be beneficial to workplace dispute procedures because they helped promote consistency and fairness amongst the treatment of individuals.[273] However, he felt that the SDDPs had failed to produce the desired outcome as there was in fact a rise in the number of tribunal applications.[274] Gibbons said that the EA of 2002 failed to test the depths of

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[266] Earnshaw J & Hardy S, "*Assessing an Arbitral Route for Unfair Dismissal*," *ILJ* Vol 30 (2001) 291.
[267] Employment Rights (Dispute Resolution) Act of 1998, s 7.
[268] Earnshaw J & Hardy S, "*Assessing an Arbitral Route for Unfair Dismissal*," *ILJ* Vol 30 (2001) 291.
[269] Sanders A, *"Part One of the Employment Act 2008: "Better" Dispute Resolution?" ILJ* Vol 38 (2009) 30.
[270] Sanders A, "*Part One of the Employment Act 2008: "Better" Dispute Resolution?" ILJ* Vol 38 (2009) 31.
[271] Gibbons, M, "*Better Dispute Resolution: A Review of Employment Dispute Resolution in Great Britain* (DTI) (2007) 5.
[272] Ibid.
[273] ACAS Code on Disciplinary and Grievance Procedures 2004, para 1.
[274] Sanders A, *"Part One of the Employment Act 2008: "Better" Dispute Resolution?" ILJ* Vol 38 (2009) 38.

dispute resolution and that the EA of 2008 would follow suit.[275] He found that there are more ways to encourage workplace dispute resolution that the 2008 Act does not include.[276]

There was a general sentiment that the government should have given greater support to trade unions, as this would encourage an increase in internal procedures in unionised workplaces.[277] Sanders[278] reiterates that this would strengthen the fairness of dismissal, a point outlined in the case of *Polkey,*[279] and limit compensatory reductions which would in turn incentivise employers to follow procedures.[280] The shortcomings of the EA highlighted the need for a new arrangement when dealing with unfair dismissal disputes.[281]

## 4. ACAS

ACAS is an independent and impartial government agency that aims to improve industrial relationships between an employer and employee.[282] As noted above, England's dual employment system for unfair dismissals relies heavily on ACAS.[283] The use of ACAS remains entirely voluntary and it is according to the parties' discretion should they wish to seek alternative dispute resolution.[284] The institute charges no fees and maintains confidentiality throughout.[285] Furthermore, the institution offers conciliation, mediation and arbitration, and ACAS remains under a statutory obligation to promote voluntary settlements of employment matters.[286]

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[275] Sanders A, *"Part One of the Employment Act 2008: "Better" Dispute Resolution?" ILJ* Vol 38 (2009) 41.
[276] Ibid.
[277] Ibid.
[278] Sanders A, *"Part One of the Employment Act 2008: "Better" Dispute Resolution?" ILJ* Vol 38 (2009) 41.
[279] *Polkey v AE Dayton Services Ltd* [1987] UKHL 8.
[280] Sanders A, *"Part One of the Employment Act 2008: "Better" Dispute Resolution?" ILJ* Vol 38 (2009) 41.
[281] Earnshaw J & Hardy S, "*Assessing an Arbitral Route for Unfair Dismissal*," *ILJ* Vol 30 (2001) 291.
[282] Leonard Rico, *"Legislating Against Unfair Dismissal: Implications from British Experience*," 8 Berkley. J. EMP & Lab. L. (1986) 553.
[283] Deakin S, Gillian S Morris, "Labour Law" 5th ed (2009) 69.
[284] Ibid.
[285] Leonard Rico, *"Legislating Against Unfair Dismissal: Implications from British Experience*," 8 Berkley. J. EMP & Lab. L. (1986) 554.
[286] Ibid.

An ACAS officer is to provide useful information and options to the parties during the arbitration process as they aim to settle outstanding issues.[287] If the dispute remains unresolved, it will be referred to the tribunal, whereby ACAS's involvement in the matter terminates.[288] Aside from resolving dismissal disputes, ACAS is responsible for developing the Code of Practice, "The Code," on interpreting dismissal legislation.[289] The Code plays a significant role in setting benchmarks for the correct dismissal procedure and whilst it is not a binding instrument, the tribunals must adhere to it when addressing unfair dismissal claims.[290] Additionally, the implementation of the ACAS Scheme provides a clear guideline for arbitrators when handling arbitrations, both of which will be discussed in more detail below.

### *4.1 ACAS Scheme*

The ACAS Scheme came into force in 2001[291] to allow ACAS to refer the dispute to an arbitrator once they agree to arbitration.[292] The arbitrator does not deal with any disputes relating to jurisdiction or the determination of whether an individual is an employee or not, but rather on issues relating to dismissals only.[293] The panel of arbitrators need not be lawyers but rather those with relevant employment relations experience.[294] The arbitrator's duty is to be impartial and fair, as well as to "adopt procedures suitable to the circumstance of the particular case."[295] During the arbitration proceedings, evidence will not be given on oath, the approach would be more inquisitorial, and the decision will be passed on to the parties only, assuring a level of privacy.[296]

In contrast to the CCMA, ACAS does not have a review procedure for arbitration decisions. In fact, an arbitrator's award can only be challenged through an

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[287] Leonard Rico, *"Legislating Against Unfair Dismissal: Implications from British Experience*," 8 Berkley. J. EMP & Lab. L. (1986) 554.
[288] Ibid.
[289] Leonard Rico, *"Legislating Against Unfair Dismissal: Implications from British Experience*," 8 Berkley. J. EMP & Lab. L. (1986) 554.
[290] Ibid.
[291] Leonard Rico, *"Legislating Against Unfair Dismissal: Implications from British Experience*," 8 Berkley. J. EMP & Lab. L. (1986) 554.
[292] Ibid.
[293] ACAS Arbitration Scheme 2001, p7
[294] Earnshaw J & Hardy S, "*Assessing an Arbitral Route for Unfair Dismissal*," *ILJ* Vol 30 (2001) 294
[295] ACAS Arbitration Scheme 2001, p 12.
[296] ACAS Arbitration Scheme 2001, p 15.

appeal based on limited circumstances.[297] These circumstances are based on the grounds of substantive jurisdiction, serious irregularity of the arbitrators conduct in making the decision[298] and whether there is a question of EU and Human Rights Law.[299] Any appeals to the arbitrator's decision would have to be made to the High Court.[300] It is important that the parties raise their point with the arbitrator or Scheme during the arbitration proceedings as they may lose their right to challenge the decision.[301]

Entry into the arbitration process is through an arbitration agreement, which must stipulate consent from both parties and their representatives.[302] The purpose of the Scheme is to provide an informal and private environment into which parties may bring their dismissal issues, as opposed to the court. Unfortunately, as with all recommendations, they are prone to problems. The Scheme may prove problematic as there may be a risk of erratic decision-making from a single arbitrator, as opposed to three decision makers during a tribunal hearing.[303] Furthermore, the fact that the arbitrator may not be a lawyer or possess the relevant legal knowledge may be a cause for concern, as the decision may not be legally well informed.[304] The issue of legal representation during proceedings will be dealt with in more detail in the next chapter.

### *4.2 ACAS Code of Practice on Disciplinary and Grievance Procedures*

Whilst the ACAS Scheme was aimed at parties resorting to arbitration when dealing with their matter, the question arises as to what must be followed when making the decision. According to the ACAS Code of Practice on "Disciplinary practice and procedures," the Code was formed to be in line with the recommendations of the Gibbons Review,[305] which would be accompanied by a comprehensive non-statutory

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[297] ACAS Arbitration Scheme 2001 p 23
[298] Ibid.
[299] Ibid.
[300] ACAS Arbitration Scheme 2001, p 56-57.
[301] ACAS Arbitration Scheme 2001 p 24.
[302] Ibid.
[303] Earnshaw J & Hardy S, "*Assessing an Arbitral Route for Unfair Dismissal*," *ILJ* Vol 30 (2001) 294.
[304] Ibid.
[305] Gibbons, M, "*Better Dispute Resolution: A Review of Employment Dispute Resolution in Great Britain*,"(DTI) (2007) 5.

guide. The arbitrators must use The Code to determine the terms of reference and whether they are fair according to the laid-out provisions.[306]

According to Sanders,[307] the Code reiterates the standard of unreasonable behaviour under s 98 (4) ERA. Although the Code may have been updated, there are still standards that appear more lenient than those found in previous versions.[308] This may deprive employees of their essential protections under previous ACAS Codes, such as the concept that the employer's disciplinary action must be proportionate to the circumstances.[309]

The purpose of the ACAS Code of Practice is to aid employers, employees and their representatives with a practical guideline to follow when handling disputes informally.[310] The arbitrator is to make consistent reference to the Code throughout the arbitration hearing in order to have cognisance of the correct principles surrounding fairness and reasonableness.[311] The Code of Practice serves as a reference for employers to utilise prior to taking any claims to court and arbitration.[312] The ET and the ACAS arbitrator will take the Code into account when making decisions,[313] however the arbitrator will not apply any legal tests or rules carried out by the tribunals.[314]

Clearly, the legislation laid out by the English government has come a long way through a variety of resolutions, statutes and amendments. Whilst the ERA and EA aim to provide employees with protection, they fail to address alternative methods of dispute resolution. The creation of the ACAS Scheme alongside the framework of the Code proves that these instruments aim to implement dispute

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[306] ACAS Arbitration Scheme 2001, part IV, para 12.i at 10.
[307] Sanders A, *"Part One of the Employment Act 2008: "Better" Dispute Resolution?" ILJ* Vol 38 (2009).
[308] Sanders A, *"Part One of the Employment Act 2008: "Better" Dispute Resolution?" ILJ* Vol 38 (2009) 43.
[309] Sanders A, *"Part One of the Employment Act 2008: "Better" Dispute Resolution?" ILJ* Vol 38 (2009) 42.
[310] ACAS Code of Practice on Disciplinary and Grievance Procedures, < http://www.acas.org.uk/media/pdf/f/m/Acas-Code-of-Practice-1-on-disciplinary-and-grievance-procedures.pdf> last accessed January 8th 2018.
[311] ACAS Arbitration Scheme 2001, p 19.
[312] ACAS, <http://www.acas.org.uk/index.aspx?articleid=2174> last accessed 8th January 2018.
[313] Ibid.
[314] ACAS Arbitration Scheme 2001, p 19.

resolution measures that adhere to the stringent principles of fairness when it comes to dismissals.[315]

## 5. ARBITRATION PROCEDURE WHEN DEALING WITH DISMISSAL DISPUTES

With an overview of the arbitration process complete, it is necessary to analyse the appropriate procedure and process when it comes to arbitration in dismissal disputes. The ER(DR)A[316] outlines the need for a scheme relating directly to dismissal issues and with the ACAS Scheme in place, a coherent guideline allows the arbitrator to draw up practical rules and techniques on how to resolve them.[317]

The Scheme is usually triggered in situations where parties to a dismissal claim agree in writing to use arbitration as a method of resolving the dispute. This is formally known as the arbitration agreement of settlement,[318] and once this pre-requisite has been fulfilled, ACAS will transfer the case to an arbitrator. It is important that the agreement be laid out formally[319] to ensure that the parties are protected from being pressured into arbitration.[320] Based on the matter in front of them, the arbitrator will expect the parties to engage fully in the process through the exchange of documents, witnesses and discussions.[321] The arbitrator's role will be inquisitorial and there will be no direct cross-examination, although questions may be put forward through the arbitrator.[322]

Once the arbitrator has carried out the hearings and examinations, it will be the arbitrator's duty to adhere to the standards set out in the ACAS Code and the ACAS Handbook "Discipline at Work"[323] when making a decision. The standards are not a substantive law measure but rather in accordance with employment relations, which will take into account the standards and good practice of the

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[315] Sanders A, *"Part One of the Employment Act 2008: "Better" Dispute Resolution?" ILJ* Vol 38 (2009) 43.
[316] Employment Rights (Dispute Resolution) Act of 1998.
[317] Leonard Rico, *"Legislating Against Unfair Dismissal: Implications from British Experience*," 8 Berkley. J. EMP & Lab. L. (1986) 554.
[318] Hardy et al, "*ADR in Employment Law*," 1st ed, Cavendish Publishing (2003) 6.
[319] Ibid.
[320] Hardy et al, "*ADR in Employment Law*," 1st ed, Cavendish Publishing (2003) 7.
[321] Ibid.
[322] Ibid.
[323] ACAS Arbitration Scheme 2001, part IV, para 12.i at 10.

industry.[324] When the decision is ready to be issued, it will be addressed to the parties only to allow a level of privacy, and when it comes to remedies available for the parties, it will be in line with the same tribunal principles and limits such as re-instatement, re-engagement or compensation.[325]

Any request for appeal will have to be sent within 28 days from the decision and issued as a notice to the parties and ACAS, which the court will address.[326] These cases are often very limited as an appeal can only be made in special circumstances.[327] It is important to note that the award is made in writing, signed, binding and final.[328] Although the process is voluntary, the awards remain enforceable in the High Court and County Court.[329]

## 6. CONCLUSION

In conclusion, it is clear that the process of arbitration in England developed over time. As a process in Employment law, alternative dispute resolution is proving to be increasingly significant. Through the progression of its statutory instruments, the government is committed to implementing fairness and efficiency when it comes to dismissals. The main purpose of alternative dispute resolution is to reduce the need for litigation in a timely manner and to improve workplace communication through other means such as arbitration or conciliation. The fact that the alternative dispute resolution process is voluntary encourages applicants to come to the table on their own terms with the dispute being resolved confidentially and without as much pressure as litigation would entail.[330]

If a dispute cannot be resolved, then, subject to the parties' rights, the issue can be brought to the ET or court, albeit at the high price of cost and effort. The implementation of the arbitration scheme provides greater clarity and leads to a formalisation of the arbitration procedure in employment law.[331] How far this has gone to expand and develop dispute resolution will be assessed in more detail. The

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[324] Earnshaw J & Hardy S, "*Assessing an Arbitral Route for Unfair Dismissal*," *ILJ* Vol 30 (2001) 295.
[325] Hardy et al, "*ADR in Employment Law*," 1st ed, Cavendish Publishing (2003) 7.
[326] Ibid. See also ACAS Arbitration Scheme Part XXIV p56-57.
[327] Hardy et al, "*ADR in Employment Law*," 1st ed, Cavendish Publishing (2003) 7.
[328] ACAS Arbitration Scheme p 23.
[329] Ibid.
[330] Hardy et al, "*ADR in Employment Law*," 1st ed, Cavendish Publishing (2003) 11.
[331] Clark J, "*Adversarial and Investigative Approaches to the Arbitral Resolution of Dismissal Disputes: A Comparison of South Africa and the UK*," (1999) *ILJ* Vol 28 335.

next chapter discusses ACAS's success and shortcomings, as was carried out in the previous chapter, according to its efficiency, accessibility and informality.

## CHAPTER FIVE

## SUCCESS AND SHORTCOMINGS OF ACAS IN RESOLVING DISMISSAL DISPUTES

### 1. INTRODUCTION

Since its formation in 1972, the Advisory, Conciliation and Arbitration Service "ACAS," is the arbitration service provider in England for resolving dismissal disputes. ACAS aims to improve organisational performance and the working life relationship between the employer and employee.[332] As an independent body with statutory responsibilities, ACAS has a broader role encompassing the prevention of disputes within the employment arena. As mentioned in the previous chapter, the ACAS Arbitration Scheme was established after 2001 with the goal of encouraging the use of alternative dispute resolution. Despite the crucial part tribunals play within the employment system, they lacked accessibility and informality when resolving disputes. These inefficiencies were compounded by the substantial increase in the number of claims.[333] Thus, reform of the current dispute resolution system was necessary as new disciplinary grievance procedures were implemented under ACAS.

As carried out in the previous chapter with the CCMA, an analysis of the successes and shortcomings of ACAS in resolving dismissal disputes will be conducted. By evaluating each institution using a similar approach, a comparison as to how far each organisation has gone to meet their goals can be drawn. This will indicate whether each foundation is successfully carrying out their tasks.

Firstly, an analysis of the successes ACAS has maintained by reforming the tribunal system will be conducted. This will be carried out by drawing information from the Annual Report[334] of ACAS and looking at the changes that have been made to employment dispute resolution in more detail.

Secondly, the chapter will outline the pitfalls of ACAS and whether it has managed to create a coherent system of dispute resolution. Additionally, whether the

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[332] Sen Amit, "*The Role of Acas in dispute resolution*," < http://www.acas.org.uk/media/pdf/8/p/The_role_of_Acas_in_dispute_resolution.pdf> last accessed 5th January 2018.
[333] Colling T, *"No Claim, No Pain? The Privatization of Dispute Resolution in Britain,"* Vol 25 Issue 4 pg 555-579 (2004).
[334] ACAS. 2016/2017 Annual Report and Accounts, Government Publication available at < http://www.acas.org.uk/media/pdf/e/s/Acas-annual-report-2016-2017.pdf> last accessed 10 January 2018.

implementation of ACAS has aided in substantially reducing the unfair dismissal claims over the last decade will be considered. As laid out in the Donovan Commission (1965-8),[335] the aim of reforming the tribunal service was to provide an "accessible, speedy, informal and inexpensive"[336] means of dispute resolution. Analysing the above mentioned factors will give a clear indication whether the ACAS Arbitration Scheme and the organisation has managed to adopt the mission originally laid out by the Donovan recommendations.[337]

## 2. SUCCESSES OF ACAS IN RESOLVING DISMISSAL DISPUTES

### *2.1 Efficiency*

In labour disputes, speedy resolution is often desirable to reach a settlement or to reduce any claims that are brought before a tribunal. According to the ACAS Annual Report of 2016,[338] the highest number of claims are derived from unfair dismissal disputes, with the largest number of reported cases in comparison to other types of dispute claims.[339] The Employment Tribunal (ET) aims to hear a claim within 26 weeks from when it was brought,[340] which can often be a strenuous delay for someone wishing to be reinstated or granted compensation. The delays and issues arising from the tribunal system may be caused by the technicalities, complexities and the lack of resources to resolve the matter, which are, unfortunately, revealed only after the initial hearing.[341]

ACAS has proved successful in resolving these issues expeditiously by allowing parties to the dispute to develop and control the resolution procedures with conciliation as a first resort.[342] ACAS is under a statutory obligation under section 18 and 18C of the Employment Tribunals Act (ETA)[343] to get involved once a claim involving dismissals has been lodged. ACAS's results prove that the organisation has been able to resolve a higher proportion of disputes through conciliation rather than

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[335] Colling T, *"No Claim, No Pain? The Privatization of Dispute Resolution in Britain,"* Vol 25 Issue 4 pg 555-579 (2004) p558- 559.
[336] Ibid.
[337] Ibid.
[338] ACAS. 2016/2017 Annual Report and Accounts, Government Publication available at < http://www.acas.org.uk/media/pdf/e/s/Acas-annual-report-2016-2017.pdf> last accessed 10 January 2018 p29.
[339] Ibid.
[340] Colling T, *"No Claim, No Pain? The Privatization of Dispute Resolution in Britain,"* Vol 25 Issue 4 pg 555-579 (2004) p561.
[341] Ibid.
[342] Cabrelli D, *"Employment Law In Context,"* 2nd ed, (2016) Oxford, p52 – 53.
[343] Employment Tribunals Act 1996.

arbitration,[344] but despite this, there may be some instances whereby arbitration is a more appropriate way to resolve a dispute.

ACAS can arrange for arbitration to take place within three weeks after clearer terms of reference have been established.[345] According to the ACAS Arbitration Scheme, an unfair dismissal hearing aims to take half the time[346] as the ET. In fact, when the arbitrator completes an award, it is required that the award be simultaneously issued to both parties within three weeks after the award has been signed by the arbitrator.[347] If there are any complaints or queries relating to the arbitration award, ACAS ensures that they do not interfere with the award, thus preserving the independence of the arbitrators from the institution.[348]

*2.2 Accessibility*

Any person should have the right to access dispute resolution services and there should be no prejudicial restrictions. ACAS has proven successful as most parties express contentment with the service as well as the expeditiousness with which it deals with claims.[349] In fact, ACAS processed 77 per cent of the cases on the ET's list,[350] thus saving many parties a significant amount of time and distress. This success can be attributed to ACAS's accessibility in resolving claims before resorting to tribunals. Accessibility proves useless if it does not provide a route to justice for its parties. ACAS has offices situated around the English region including Scotland and Wales, as the CCMA has offices situated around South Africa. Once an arbitrator has been selected, the location of the arbitration is at the discretion of the

[344] ACAS. 2016/2017 Annual Report and Accounts, Government Publication available at < http://www.acas.org.uk/media/pdf/e/s/Acas-annual-report-2016-2017.pdf> last accessed 10 January 2018 p24.
[345]Sen Amit, "*The Role of Acas in dispute resolution*," < http://www.acas.org.uk/media/pdf/8/p/The_role_of_Acas_in_dispute_resolution.pdf> last accessed 5th January 2018.
[346] ACAS Arbitration Scheme (England and Wales) Order 2001, SI 2001/1185 p26.
[347] ACAS Arbitration Scheme (England and Wales) Order 2001, SI 2001/1185 p22.
[348] Sen Amit, "*The Role of Acas in dispute resolution*," < http://www.acas.org.uk/media/pdf/8/p/The_role_of_Acas_in_dispute_resolution.pdf> last accessed 5th January 2018 p17-18.
[349] Colling T, *"No Claim, No Pain? The Privatization of Dispute Resolution in Britain,"* Vol 25 Issue 4 pg 555-579 (2004) p560.
[350] Colling T, *"No Claim, No Pain? The Privatization of Dispute Resolution in Britain,"* Vol 25 Issue 4 pg 555-579 (2004) p561.

parties.[351] Additionally, ACAS arbitrators originate from a diverse range of backgrounds with an extensive breadth of experience.[352]

In terms of legal representation, parties are free to seek aid in presenting their case, but lawyers will receive no special treatment, and this means that any technicalities such as swearing on oath or examination of witnesses are removed.[353] Although there will be no cross-examining, the arbitrator is free to address any questions to those representing the party and their witnesses, as outlined in the ACAS Arbitration Scheme.[354] Under Rule 25 of the CCMA, legal representation is permitted in situations where the parties have given consent or the commissioner concludes it is unreasonable to deal with the dispute without representation.[355]

ACAS arbitration is free to its users, and likewise, the CCMA provides the same sort of inexpensive service.[356] The fact that ACAS provides a free alternative dispute resolution service before the claim reaches a tribunal gives employees a greater incentive for its use. In fact, from 2014 to 2016, there was a significant increase in case referrals to arbitration.[357] More specifically, the Annual Report of 2016[358] shows how successful ACAS has been in processing dismissal disputes before reaching the ET.[359] Another advantage of ACAS is shown through the accessibility of their advisory services such as call lines or online sessions. The most recent report[360] suggests that most voice calls received by the institute relate to discipline and dismissal matters.[361] This additional means of contacting ACAS

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[351] ACAS Arbitration Scheme (England and Wales) Order 2001, SI 2001/1185 p26.
[352] Sen Amit, "*The Role of Acas in dispute resolution*," < http://www.acas.org.uk/media/pdf/8/p/The_role_of_Acas_in_dispute_resolution.pdf> last accessed 5th January 2018 p17-18.
[353] ACAS Arbitration Scheme (England and Wales) Order 2001, SI 2001/1185 p17.
[354] Ibid.
[355] Rule 25, Rules for the conduct of proceedings before the CCMA GNR 1448 GG 25515 of 10 October 2003 ('the CCMA Rules').
[356] Sen Amit, "*The Role of Acas in dispute resolution*," < http://www.acas.org.uk/media/pdf/8/p/The_role_of_Acas_in_dispute_resolution.pdf> last accessed 5th January 2018 p17-18.
[357] ACAS. 2016/2017 Annual Report and Accounts, Government Publication available at < http://www.acas.org.uk/media/pdf/e/s/Acas-annual-report-2016-2017.pdf> last accessed 10 January 2018 p35.
[358] Ibid.
[359] Ibid.
[360] ACAS. 2016/2017 Annual Report and Accounts, Government Publication available at < http://www.acas.org.uk/media/pdf/e/s/Acas-annual-report-2016-2017.pdf> last accessed 10 January 2018.
[361] ACAS. 2016/2017 Annual Report and Accounts, Government Publication available at < http://www.acas.org.uk/media/pdf/e/s/Acas-annual-report-2016-2017.pdf> last accessed 10 January 2018 p36.

proves how accessible the organisation is, but it must be borne in mind that the institute cannot be considered a great virtue to society unless it provides some means of justice to the parties.[362]

*2.3 Informality*

Tribunals must ensure that legal precedents are upheld and legal procedures are followed throughout any proceedings.[363] ETs have to portray the same formalities and legalisms adopted in the courts.[364] ACAS aims to reduce these formalities by making the process voluntary on the parties.[365] Any arbitration carried out by ACAS is binding in court and the fact that the process is free portrays a contrast to the ET.[366]

The procedural requirement for parties that have undergone conciliation and still wish to resolve their claim through ACAS consists only of a waiver of their rights to have the issue heard at a tribunal.[367] At this point, two ET forms are signed and submitted to the tribunal, and the ACAS Arbitration Scheme will apply from the moment the arbitration agreement is accepted.[368] As with the CCMA, there is flexibility in the ACAS process as the arbitration itself is carried out using a mix of an adversarial and inquisitorial approach, as opposed to the legalistic manner in which tribunals operate.[369] One of the main benefits of ACAS arbitration is the privacy in which the hearings are held. The institute's commitment to confidentiality is a contrast to tribunal proceedings as the parties' hearings are more privately located.[370]

Another attraction of ACAS is the fact that the arbitration remedies available provide the same scope of service as tribunals without the tedious technicalities.

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[362] Colling T, *"No Claim, No Pain? The Privatization of Dispute Resolution in Britain,"* Vol 25 Issue 4 pg 555-579 (2004) p560.
[363] Colling T, *"No Claim, No Pain? The Privatization of Dispute Resolution in Britain,"* Vol 25 Issue 4 pg 555-579 (2004) p562.
[364] Ibid.
[365] Hardy et al, "*ADR in Employment La*w," 1st ed, Cavendish Publishing (2003) 29.
[366] Sen Amit, "*The Role of Acas in dispute resolution*," < http://www.acas.org.uk/media/pdf/8/p/The_role_of_Acas_in_dispute_resolution.pdf> last accessed 5th January 2018.
[367] ACAS Arbitration Scheme (England and Wales) Order 2001, SI 2001/1185 p9.
[368] ACAS Arbitration Scheme (England and Wales) Order 2001, SI 2001/1185 p10.
[369] Sen Amit, "*The Role of Acas in dispute resolution*," < http://www.acas.org.uk/media/pdf/8/p/The_role_of_Acas_in_dispute_resolution.pdf> last accessed 5th January 2018 p17-18.
[370] Ibid.

Arbitration through ACAS aims to be a final recourse and attempts to bar any chances of the parties challenging the award.[371] Therefore, the arbitrator must be able to view the issue with impartiality and must possess an extensive background in and knowledge on employment dispute resolution.[372] The arbitrator is free to ask questions and there is no necessity for questioning or presentations by the parties. The informality of the arbitration procedure allows the parties to express their case without the complexities associated with tribunals.[373]

## 3. SHORTCOMINGS OF ACAS IN RESOLVING DISMISSAL DISPUTES

### *3.1 Efficiency*

Even though ACAS has proven itself as an institution of guidance in and knowledge of employment claims, there are still deficiencies within its system that require attention. When comparing the tribunal process and the ACAS process for arbitration, it is clear that any claim made to a tribunal is "direct," whereas access to arbitration is only permitted once a settlement agreement or arbitration agreement through ACAS has been signed.[374] Even though ACAS aims to hear the issue within two months, the need for an arbitration agreement may slow down the process and hence, this service may be even slower than the tribunal route in many regions.[375]

Whilst every effort has been made in the arbitration scheme to adhere to time limits, it is difficult to expect the institution to meet these targets without experiencing problems. ACAS's scheme stipulates that the agreement to submit to arbitration must be made within six weeks.[376] At this point parties only have two routes to arbitration: through a compromise agreement, or a COT3 form, which records ACAS settlements between the parties to settle actual or potential complaints to the Employment Tribunal.[377] Unfortunately, these complexities make it more difficult to determine whether a hearing will be quicker than resorting to a tribunal system.[378]

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[371] Ibid.
[372] Ibid.
[373] ACAS Arbitration Scheme (England and Wales) Order 2001, SI 2001/1185 p17.
[374] ACAS Arbitration Scheme (England and Wales) Order 2001, SI 2001/1185 p2.
[375] Earnshaw J & Hardy S, "*Assessing an Arbitral Route for Unfair Dismissal*," ILJ Vol 30 (2001) 300.
[376] ACAS Arbitration Scheme (England and Wales) Order 2001, SI 2001/1185 p13.
[377] Hardy et al, "*ADR in Employment Law*," 1st ed, Cavendish Publishing (2003) 58.
[378] Ibid.

Every case is different and with the cooperation of all the parties involved, ACAS strives to conduct hearings within four weeks of, but no later than eight weeks from, the time of referral.[379] Although the arbitrator can determine the venue and date, it can only occur eight weeks after ACSA has been notified of the arbitration agreements.[380] Additionally, although the arbitrator will only have one matter to deal with, there is a likelihood that a hearing will not be completed within the time and the award will take much longer as it is presented in writing at a much later date.[381] In contrast, a tribunal's decision can be presented at the hearing or it can be adjourned for a later time when the tribunal feels it is equitable to do so.[382] The date is flexible as the decision can be made on the same day but it is estimated that decisions are handed down approximately within two months.[383]

Based on the most recently published Annual Report of 2016-2017,[384] the number of cases referred to arbitration has reduced compared to the previous two years.[385] This can be attributed to the fact that people are unaware of the process or they find it senseless to resort to arbitration when they could receive a decision quicker by filing a claim through an ET. Another issue of ACAS when it comes to efficiency is the fact that due to this aim of "finality", appeals are only allowed for certain points of law relating to Human Rights or EU law.[386] In fact, issues that an arbitrator may deal with are limited and if any issue is beyond the scope of their knowledge, a legal advisor may be required to guide the arbitrator.[387]

### *3.2 Accessibility*

Although arbitration may seem more attractive than adjudication, it should be noted that many are unaware of what arbitration is. When arbitration was introduced initially, surveys were conducted and found that only 35 per cent of respondents

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[379] Ibid.
[380] Ibid.
[381] ACAS Arbitration Scheme (England and Wales) Order 2001, SI 2001/1185 p23.
[382] "-,<https://www.citizensadvice.org.uk/work/problems-at-work/employment-tribunals/employer-s-response-to-an-employment-tribunal-claim/> last accessed 27th January 2018.
[383] Ibid.
[384] ACAS. 2016/2017 Annual Report and Accounts, Government Publication available at < http://www.acas.org.uk/media/pdf/e/s/Acas-annual-report-2016-2017.pdf> last accessed 10 January 2018 p35.
[385] Ibid.
[386] ACAS Arbitration Scheme (England and Wales) Order 2001, SI 2001/1185 p6.
[387] Ibid.

knew what it was or had experience with it.[388] Although arbitration through ACAS appears to be a cheaper route compared to going through a tribunal, the courts have recently overturned the requirement of tribunal fees.[389] In the case of *R (UNISON) v Lord Chancellor*,[390] the courts held that fees for ET are unlawful because they impede access to justice and defy the rule of law.[391] This means that employees may not even feel the need to go through arbitration as they can easily seek justice through the tribunals. Although conciliation through ACAS remains a requisite, unfortunately, arbitration still remains voluntary.[392]

The expense of running ACAS procedures also adds a significant amount of cost to the entire arbitration process for the state. Based on the Annual Report,[393] it costs approximately £2 242 to hold an arbitration hearing, and although this figure has reduced in comparison to the previous year, it is still the highest billing service compared to conciliation or telephone guidance.[394] Since ACAS arbitrators are not employed, they are usually appointed on a case-by-case basis with an estimated number of around 100 arbitrators under the scheme.[395] Thus, an increase in resources would be highly beneficial especially when it comes to the number of arbitrators available. Furthermore, the fact that there is one arbitrator as opposed to the tribunal's panel of three may also prove controversial as the decision making may be biased, and with no right of appeal, it is difficult for applicants to seek fairness in their dismissal claim.[396]

### *3.3 Informality*

The purpose of an informal approach when resolving disputes through alternative dispute resolution is to reduce technicalities whilst maintaining the rule of law. An arbitration hearing will be structured according to the Arbitration Scheme despite being an informal process. As mentioned in the previous chapter, the absence

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[388] Earnshaw J & Hardy S, "*Assessing an Arbitral Route for Unfair Dismissal*," *ILJ* Vol 30 (2001) 299.
[389] *R (UNISON) v Lord Chancellor* [2017] UKSC 51.
[390] [2017] UKSC 51.
[391] Ibid.
[392] ACAS Arbitration Scheme (England and Wales) Order 2001, SI 2001/1185 p2.
[393] ACAS. 2016/2017 Annual Report and Accounts, Government Publication available at < http://www.acas.org.uk/media/pdf/e/s/Acas-annual-report-2016-2017.pdf> last accessed 10 January 2018.
[394] ACAS Arbitration Scheme (England and Wales) Order 2001, SI 2001/1185 p27.
[395] Hardy et al, "*ADR in Employment Law,*" 1st ed, Cavendish Publishing (2003) 24.
[396] Earnshaw J & Hardy S, "*Assessing an Arbitral Route for Unfair Dismissal*," *ILJ* Vol 30 (2001) 303.

of lawyers may be seen as a reduction in expense for applicants. However, a lawyer's presence makes a significant difference as they define the issues but also assist in hearings by facilitating a settlement.[397] However, the fact that the arbitration process often follows an inquisitorial rather than an adversarial approach discourages lawyers from participating in these hearings.[398]

The fact that arbitration provides the same remedies as that of ET proves attractive to its users. However, the fact that arbitrators do not provide reasons for the award makes it harder for an applicant to appeal the decision or engage with the actual dispute.[399] ACAS aims to uphold the procedures followed by tribunals, but arbitrators are discouraged from providing recommendations or straying into "unknown territory"[400] as this could potentially lengthen the dispute.[401]

The choice of arbitrator is one of the most important decisions for ACAS to make. As mentioned previously, the arbitrator is not an employee of ACAS, but a third party agent.[402] Brown[403] comments that it is essential for an arbitrator to have experience in settling disputes by arbitration and that 88.9 per cent of the respondents in her survey emphasised this importance.[404] Additionally, her research showed that the majority of the applicants that used the ACAS arbitration process felt their arbitrators lacked sufficient understanding of the procedures[405] and that the arbitrator was sympathetic towards the "underdog" in the situation.[406] This point in particular proves that ACAS needs to recruit adequately qualified arbitrators with the relevant knowledge and independence to hear a case.

In the ET system, there is a high charge for legalism.[407] It is difficult not to follow a legal approach when it comes areas of law such as unfair dismissals, which

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[397] Ibid.
[398] Hardy et al, "*ADR in Employment Law*," 1st ed, Cavendish Publishing (2003) 74.
[399] Earnshaw J & Hardy S, "*Assessing an Arbitral Route for Unfair Dismissal*," *ILJ* Vol 30 (2001) 303.
[400] Brown A, *"ACAS arbitration: a case of consumer satisfaction*?," *IRJ* Vol 23 Issue 3 (1992) 230.
[401] Ibid.
[402] Hardy et al, "*ADR in Employment Law*," 1st ed, Cavendish Publishing (2003) 24.
[403] Brown A, "*ACAS arbitration: a case of consumer satisfaction*?," *IRJ* Vol 23 Issue 3 (1992) 231.
[404] Ibid.
[405] Ibid.
[406] Ibid.
[407] Hardy et al, "*ADR in Employment Law*," 1st ed, Cavendish Publishing (2003) 65-66.

require adherence to the prescribed legislation.[408] The Arbitration Scheme aims to avoid legalism through limiting the enquiry to the main issue: the fairness of the dismissal.[409] However, if there are issues of EU or Human Rights Law, legalism will be inevitable.[410] Furthermore, when addressing the issue of fairness, arbitrators rely on the knowledge of previous cases they have dealt with. This may create contention as arbitration is held privately so there is no clear-cut way of knowing the standards to which an employer should adhere.[411]

Additionally, an employer may be unaware of how the dismissal claim will be explored by the arbitrator and what conditions to follow before the claim is brought to arbitration.[412] This means ACAS may have to intervene at certain points with the arbitration to ensure consistency, which conflicts with ACAS's aim to preserve the independence and integrity of an arbitrator's decision.[413]

## 4. CONCLUSION

According to Lewis and Clark,[414] the purpose of arbitration is to serve as a "cheaper, informal and more accessible"[415] form of dispute resolution that offers a more flexible range of remedies.[416] The concept of arbitration was introduced into the British system in the early 1970's.[417] The creation of ACAS as an alternative dispute resolution centre for unfair dismissal claims proves successful in its goal to reduce the caseload of tribunals. There is arguably no doubt that the successes discussed in this chapter prove that the implementation of an arbitration scheme provides a critical and useful service to the employment system.

The simplicity and efficiency of arbitration procedures reassures applicants that the process will be less daunting and technical. There are similar remedies applied in tribunals, which are offered to those who undertake arbitration. The purpose is to mirror the principles and awards that a tribunal could offer without the

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[408] Ibid.
[409] Ibid.
[410] Hardy et al, "*ADR in Employment Law*," 1st ed, Cavendish Publishing (2003) 67.
[411] Hardy et al, "*ADR in Employment Law*," 1st ed, Cavendish Publishing (2003) 73.
[412] Ibid.
[413] ACAS Arbitration Scheme (England and Wales) Order 2001, SI 2001/1185 p23.
[414] Lewis, R and Clark, J, "*Employment Rights, Industrial Tribunals and Arbitration; The Case for Alternative Dispute Resolution*," (1993) London: Institute of Employment Rights.
[415] Earnshaw J & Hardy S, "*Assessing an Arbitral Route for Unfair Dismissal*," *ILJ* Vol 30 (2001) 299.
[416] Ibid.
[417] Brown A, "*ACAS arbitration: a case of consumer satisfaction?,*" *IRJ* Vol 23 Issue 3 (1992) 233.

associated complexities and delays. Confidentiality is key, and whilst some may feel deterred, others prefer the privacy with which one is able to have one's case heard and dealt with. The Donovan ideals[418] appeared to have fallen through the cracks when it comes to the tribunal's ability to resolve dismissal claims, and although arbitration is not entirely successful in upholding those ideals, the use of ACAS and its arbitration scheme is a step in the right direction.

Unfortunately, the use of arbitration to resolve dismissal disputes is still a developing process, which in the last year failed to appear more attractive than conciliation.[419] The fact that the Arbitration Scheme provides no right to appeal proves contentious, as most applicants do not receive any reasons as to why a certain decision is made.[420] As opposed to the CCMA that provides reasons for its decisions, an applicant is left in the dark, as the decision an ACAS arbitrator makes is final.[421] The disappointing amount of cases referred to arbitration in the recent annual report[422] leads to the question of whether enough information about arbitration and its use has been marketed to the public.

Despite some of the disappointments the Arbitration Scheme lays out, it is clear that its implementation has been welcome, as it has still proved to be a swifter means of dispute resolution in a coherent and concise way.[423] The speediness in which disputes are dealt with, the flexible nature of proceedings and the privacy in which the hearings are held are appealing to applicants over the tribunal system.[424] Despite the fact that many applicants view arbitration as a last resort, many experienced representatives would encourage the use of ACAS arbitration at first instance in specific cases.[425]

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[418] Earnshaw J & Hardy S, "*Assessing an Arbitral Route for Unfair Dismissal*," *ILJ* Vol 30 (2001) 303.
[419] ACAS. 2016/2017 Annual Report and Accounts, Government Publication available at < http://www.acas.org.uk/media/pdf/e/s/Acas-annual-report-2016-2017.pdf> last accessed 10 January 2018 p35.
[420] Earnshaw J & Hardy S, "*Assessing an Arbitral Route for Unfair Dismissal*," *ILJ* Vol 30 (2001) 303.
[421] ACAS Arbitration Scheme (England and Wales) Order 2001, SI 2001/1185 p23.
[422] ACAS. 2016/2017 Annual Report and Accounts, Government Publication available at < http://www.acas.org.uk/media/pdf/e/s/Acas-annual-report-2016-2017.pdf> last accessed 10 January 2018 p35.
[423] Earnshaw J & Hardy S, "*Assessing an Arbitral Route for Unfair Dismissal*," *ILJ* Vol 30 (2001) 303.
[424] Ibid.
[425] Hardy et al, "*ADR in Employment Law*," 1st ed, Cavendish Publishing (2003) 27.

This chapter consolidated the use of ACAS and its Arbitration Scheme for resolving disputes in an accessible, informal and expeditious manner. Despite the system's numerous benefits, there is still room for improvement. Inspiration for developments can be derived from the likes of the CCMA. To address how ACAS can overcome its obstacles and build on its successes, the next chapter will analyse the way in which the CCMA and ACAS can benefit from one another as institutions through recommendations and reforms.

# CHAPTER SIX

# THE CCMA & ACAS: FINDINGS AND RECOMMENDATIONS

## 1. INTRODUCTION

As mentioned throughout this thesis, an efficient, accessible and informal dispute resolution institution is an essential part of a well-functioning employment law system. In the previous chapters, the strengths and weaknesses of the public arbitration processes in South Africa and England were analysed. Both countries' systems are subject to their own unique limitations and setbacks, which could partly be resolved by each system learning from the other. Thus, this chapter aims to establish recommendations from both systems.

To do this, a comparative analysis will be carried out exploring the pitfalls of the CCMA and ACAS. Whilst there are key differences between each country's legislation, their dispute resolution techniques are similar, making a comparative analysis possible. By means of this comparison, an in-depth investigation into the challenges these systems face during dismissal disputes resolution by arbitration can be undertaken. Finally, a number of recommendations will be proposed which the CCMA and ACAS could implement to make internal improvements.

## 2. PITFALLS OF THE CCMA: WHAT CAN BE LEARNT FROM ACAS?

Despite the benefits of the CCMA in delivering expeditious, accessible and flexible dispute resolution when compared to the courts, there are a number of challenges the institution faces which may be detrimental to its success. As mentioned in chapter three, the increasing caseload of arbitrations in the CCMA makes it difficult for the institution to function efficiently.[426] The CCMA still has to issue an award with reasons within 14 days from when the proceedings were concluded.[427] Unfortunately, with the limited resources to hear arbitration matters, the CCMA is overburdened and thus problems may and do arise. Furthermore, the strict deadlines set out by the CCMA[428] fail to take into account the CCMA's shortage of arbitrators, thus

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[426] Levy, A & Venter, T, "*Research findings: CCMA, bargaining councils and private cases,*" *Tokiso Review 2006/7(2006)* Johannesburg: Tokiso Dispute Settlement, p80.
[427] The Labour Relations Act 66 of 1995, s 138 (7)(a).
[428] Bhorat, H., Pauw, K. & Mncube, L. "*Understanding the Efficiency and Effectiveness of the Dispute Resolution System in South Africa: An Analysis of CCMA Data"* Development Policy Research Unit (2007).

potentially resulting in more delays.[429] It has also been reported that inappropriate pressure has at times been placed on the parties to settle their disputes by CCMA commissioners seeking to save time and meet their targets.[430]

ACAS provides a wide variety of resources to the public for dealing with dismissals by means of arbitration. ACAS arbitration hearings tend to take place within two months after the arbitration agreement has been processed and submitted.[431] ACAS awards as usually issued to both parties within 21 days of the award having been certified by the arbitrator.[432]As with the CCMA, ACAS offers services through their telephone helplines, where the majority of the caseload concerns dismissal disputes.[433] This system has proved successful over the years in resolving disputes expeditiously. The CCMA can mitigate the effects of an increasing caseload by hiring third party agencies in the way ACAS has. ACAS arbitrators are not commissioners of the agency, and the separation of these powers could enable the CCMA to hire third party agencies to handle disputes which are less demanding. This will allow CCMA commissioners to give more attention to and spend more time on dismissals. Unfortunately, this will require more funding and therefore, it is suggested that there be an active lobby to the government to provide adequate funding to handle the increasing caseload. This may require due diligence into CCMA internal policies to allow for an increase in budget.

It is argued by Benjamin[434] that there is doubt surrounding the CCMA's arbitration efficiency as the institution has been criticised for being inconsistent in making decisions. It is important for the CCMA to keep consistent in their approach in order to create a guideline for future disputes. Furthermore, Benjamin[435] states that the CCMA is outdated in its approach to procedural fairness.[436] The labour landscape is constantly changing and labour law requires amendments to stay updated,

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[429] Levy, A & Venter, T, "Research findings: CCMA, bargaining councils and private cases," *Tokiso Review 2006/7(2006)* Johannesburg: Tokiso Dispute Settlement, p80.
[430] Brand J, "*CCMA: Achievements and Challenges - Lessons from the First Three Years*" (2000) 21 *ILJ* 77 p78.
[431] Towers B, "*The Handbook of Employment Relations: Law and Practice*," (2004) 4th ed London & Sterling p 240.
[432] ACAS Arbitration Scheme 2001, p 23.
[433] ACAS. 2016/2017 Annual Report and Accounts, Government Publication available at < http://www.acas.org.uk/media/pdf/e/s/Acas-annual-report-2016-2017.pdf> last accessed 10 January 2018 p29.
[434] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No 47 p25.
[435] Ibid.
[436] Ibid.

particularly when it comes to the Codes of Good Practice[437] and guidelines for small businesses in employment disputes.[438] Therefore, by aligning their approach with the most recent judicial standards while keeping their users aware of the changes, there may be a significant reduction in review cases.

The LRA affords commissioners discretion as to whether arbitrations are conducted in an adversarial or inquisitorial manner (or a combination of the two) within the parameters of the Act.[439] Clark[440] notes that although discretion given to the commissioner may appear investigative, the arbitration proceedings are often adversarial.[441] Therefore, arbitrators using an inquisitorial approach must ensure the parties can exercise their rights under s 138.[442] However, the CCMA Guidelines on Misconduct Arbitrations[443] specify in detail how the arbitrator should conduct hearings. These guidelines appear to undermine s 138 of the LRA[444] as well as the commissioner's discretion in conducting arbitrations. Even though arbitrations are to be carried out with flexibility, it is clear that regardless of how the misconduct arbitration is conducted, the arbitrators have limited autonomy in their decision making and they have to take into account the CCMA guidelines.[445]

The guidelines lay out the format of how arbitrators are to carry out the hearings and the rights of parties in proceedings.[446] Parties are given the opportunity to call witnesses and give evidence,[447] regardless of the approach the arbitrator has adopted in proceedings.[448] This confines the powers of commissioners as they are still required to secure the parties' rights despite their preference of approach during arbitration proceedings. This ambiguity may lead to inconsistencies in how proceedings are carried out during CCMA arbitrations. This goes against the whole

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[437] Code of Good Practice: Dismissal (Schedule 8 to the LRA).
[438] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No 47 p25.
[439] The Labour Relations Act 66 of 1995.
[440] Clark J, "*Adversarial and Investigative Approaches to the Arbitral Resolution of Dismissal Disputes: A Comparison of South Africa and the UK*," (1999) *ILJ* Vol 28 4 p328.
[441] Ibid.
[442] The Labour Relations Act 66 of 1995, s 138 (1) – (9).
[443] The Labour Relations Act 66 of 1995, CCMA Guidelines on Misconduct Arbitrations
[444] The Labour Relations Act 66 of 1995, s 138 (1) – (9).
[445] The Labour Relations Act 66 of 1995, CCMA Guidelines on Misconduct Arbitrations
[446] The Labour Relations Act 66 of 1995, CCMA Guidelines on Misconduct Arbitrations Guidelines 11- 16.
[447] The Labour Relations Act 66 of 1995, CCMA Guidelines on Misconduct Arbitrations Guideline 14.
[448] Ibid.

purpose of public arbitration, which is to reduce formalities such as representation and other legalisms.

Alternatively, ACAS predominantly adopts an inquisitorial approach which tends to gives its users confidence before the actual hearing in two ways.[449] Firstly, ACAS ensures that there have been formal dispute resolution attempts, such as mediation or internal appeals.[450] Secondly, an arbitration agreement is sent to the arbitrator stipulating that the parties have agreed to arbitration, together with their terms of reference.[451] This proves advantages as it sets out what the parties aim to achieve, which could contribute to a more focused and efficient dispute resolution process. Although the CCMA provides compulsory conciliation prior to arbitration, there is no formal agreement which outlines the parties' objectives, like the arbitration agreements drawn up by ACAS applicants. It may happen that participants in the arbitration process are largely unaware of what they are aiming to achieve. In the ACAS system, should there be a change in circumstance, the agreed terms of reference take precedence.[452]

Whilst an adversarial approach may seem appropriate for some matters, an inquisitorial approach may be more appropriate for others.[453] All in all, it seems beneficial for the CCMA to establish a form of agreement before commencing any procedures so that the parties are aware of their goals. It will also allow the arbitrator to remain focused on these goals should there be any disturbance during the proceedings.

Another advantage ACAS arbitrations have over that of the CCMA is confidentiality. Although both institutes remain publicly available, the nature in which the arbitrations are conducted differ, as ACAS remains more private by keeping the location of arbitration and the arbitrator confidential. The CCMA's hearings are held in public institutions with less confidentiality as to the location and arbitrator. When the CCMA makes an award, they are published and reported,[454]

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[449] Clark J, *"Arbitration is dismissal disputes in South Africa and the UK,"* (1997) 18 *ILJ* 617 – 618.
[450] Ibid.
[451] Ibid.
[452] Ibid.
[453] Clark J, "*Adversarial and Investigative Approaches to the Arbitral Resolution of Dismissal Disputes: A Comparison of South Africa and the UK*," (1999) *ILJ* Vol 28 4 p333.
[454] "CCMA,"<https://www.ccma.org.za/Advice/Knowledge-Hub/Downloads/Codes-Procedures>" last accessed 7th February 2018.

which is available for public access. Whilst this may improve consistency in decision making, it can reduce the privacy of the parties. Therefore, if the parties were given the autonomy to decide where the arbitration is going to be held, it could provide the parties with more control over how intimate and private the arbitration will be.

## 3. PITFALLS OF ACAS: WHAT CAN BE LEARNT FROM THE CCMA?

As illustrated in the previous chapter, ACAS provides a substantial level of support for arbitration as a method for alternative dispute resolution. However, there remains concern over their arbitration procedures during dismissal dispute resolution. One of the most prominent issues of ACAS is the fact that using their services is voluntary.[455] In England, most disputes concerning individual employment rights are resolved voluntarily through internal procedures within the business.[456] If this fails to produce positive results, the employee has a legal right to take the case to an Employment Tribunal, but not to arbitration, as it can only be resorted to with the consent of both parties and once all internal procedures and conciliation processes have been exhausted.[457] There is therefore less incentive for the parties to refer their disputes to ACAS for arbitration. In contrast, the CCMA makes conciliation and arbitration compulsory[458] for employees seeking to challenge their dismissals in an external forum.

Although arbitration decisions for individual disputes are binding, the decisions around collective arbitration cases made by an ACAS arbitrator are only binding in "honour."[459] This may prove problematic for other types of cases, as the parties are not obliged to follow the decision or refer the matter to court for further resolution. The Annual Report of ACAS 2016-2017[460] shows the reduced number of arbitrations as a method of resolution as opposed to conciliation and mediation.[461] On the other hand, the CCMA's decisions are binding and enforceable,[462] and therefore parties take proceedings more seriously. If ACAS adopted this approach to

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[455] Ibid.
[456] Ibid.
[457] Ibid.
[458] The Labour Relations Act 66 of 1995, s 143(1).
[459] ACAS, < http://www.acas.org.uk/index.aspx?articleid=2038> last accessed 25th January 2018.
[460] ACAS. 2016/2017 Annual Report and Accounts, Government Publication available at < http://www.acas.org.uk/media/pdf/e/s/Acas-annual-report-2016-2017.pdf> last accessed 10 January 2018.
[461] Ibid.
[462] The Labour Relations Act 66 of 1995, s 138(7)(a).

all arbitration claims and not just individual cases, their independence as an institution in resolving dismissal disputes would be further recognised by the courts and the public. This could also result in a higher number of cases resolved through arbitration as people would view ACAS arbitration as an enforceable route when solving dismissal issues.

Another issue apparent in the ACAS arbitration procedure is the absence of a requirement to provide reasons for an award. The arbitrator is under no obligation to provide reasons for their award,[463] which is problematic, as ACAS users are unable to pin point why a particular award was issued. In fact, ACAS refrains from interfering with the decision making process by not giving recommendations to an arbitrator in order to maintain their independence.[464] On the other hand, the CCMA provides reasons for their awards[465] and even though an appeal cannot be held based on the arbitrator's reasons, clarity is provided to the parties in a similar manner to how courts would hand down a judgment as well as the option of a review, if necessary.

A fundamental flaw in the ACAS arbitration process is its lack of an appropriate review system. If an applicant is unhappy with the arbitrator's award, they may only appeal this decision in limited circumstances including where there is an issue concerning EU law or the Human Rights Act, the arbitrator's jurisdiction, or where there is an allegation of a serious irregularity in the arbitrator's conduct.[466] As the appeal must to be made to the High Court or County Court,[467] it places the applicant under the scrutiny of the same legalism they aimed to avoid in the first place. Without any reasons provided for the award, parties may be left resorting to the appeal process since they are unlikely to obtain clarity on the decision.

On the other hand, the LRA outlines the principles governing review proceedings under s 145,[468] whereby the court is primarily required to examine how the decision was made, rather than the merits of the case. However, since the case of

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[463] Earnshaw J & Hardy S, "*Assessing an Arbitral Route for Unfair Dismissal*," *ILJ* Vol 30 (2001) 303.
[464] Brown A, "*ACAS arbitration: a case of consumer satisfaction?" IRJ* Vol 23 Issue 3 (1992) 230.
[465] The Labour Relations Act 66 of 1995, s 138(7)(a).
[466] ACAS Arbitration Scheme (England and Wales) Order 2001, SI 2001/1185 p24.
[467] Ibid.
[468] The Labour Relations Act 66 of 1995. s 145.

*Sidumo,*[469] read with the Supreme Court of Appeal's decision in *Herholdt*,[470] this section has been said to be suffused by the requirement of reasonableness. In *Sidumo,*[471] the Constitutional Court held that arbitration awards must be reviewed under s 145. This section has been pervaded by section 33 of the Constitution governing the right to just administrative action. Thus, in order for a CCMA award to be set aside, the applicant must show that the commissioner's decision was unreasonable. Furthermore, in terms of section 33 of the Constitution,[472] in South Africa the provision of reasons is an essential aspect of the review process, as it assists a court to establish whether the decision of the lower court or tribunal complies with the requirements of lawfulness, procedural fairness and reasonableness.[473] If ACAS is able to implement a separate review process, the court will be able to focus on these matters specifically rather than to allow the claim to go under the guise of an appeal.

Unfortunately, there has been a reduction in arbitration dismissal cases in the last year[474] due to the fact that most ACAS applicants are unaware of arbitration as opposed to the other services. In fact, according to the most recent report,[475] the majority of ACAS cases are processed through conciliation.[476] It is clear that there needs to be more awareness of the services provided by ACAS, especially arbitration. The CCMA conducts outreach visits to areas of South Africa, provides free explanatory leaflets to potential applicants, and conducts workshops for those employers or employees in need of dispute resolution.[477] It is recommended that ACAS increase the marketing of their services and educate the public on the procedures for arbitrations.

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[469] *Sidumo & Another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC).
[470] *Herholdt v Nedbank Ltd (congress of South African Trade Unions as amicus curiae)* [2013] 11 BLLR 1074 (SCA).
[471] *Sidumo & Another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC).
[472] *Mpahlehle v First National Bank of South Africa Ltd* 1999 (2) SA 667 (CC) 12.
[473] Ibid.
[474] ACAS. 2016/2017 Annual Report and Accounts, Government Publication available at < http://www.acas.org.uk/media/pdf/e/s/Acas-annual-report-2016-2017.pdf> last accessed 10 January 2018.
[475] Ibid.
[476] Ibid.
[477] CCMA, < https://www.ccma.org.za/Media/ArticleID/101/CCMA-CAPACITY-BUILDING-AND-OUTREACH-SERVICES> last accessed 26th January 2018.

## 4. RECOMMENDATIONS

Despite the abovementioned ways in which each institute can learn from the other to resolve deficiencies, there are circumstances whereby a solution remains to be found. This section provides recommendations which ACAS and the CCMA could follow to resolve these residual shortcomings within their systems.

### *4.1 CCMA*

Whilst the referral process during conciliation and arbitration remains simple, it is the actual procedure which may appear more technical to users.[478] Benjamin[479] discusses how a lack of representation may prove problematic during arbitration hearings.[480] Although representation is allowed in limited circumstances, it remains a highly contested issue. On the one hand, the use of lawyers could increase the technicalities of the arbitration, and on the other hand, it may aid the parties in understanding the issues in the dispute.

It is recommended that the CCMA place restrictions on the type of representation, and for what purpose they may be allowed, into the hearing. For example, the CCMA can encourage legal representatives to support the need for disputes to be expeditiously resolved as opposed to extending the formalities of the process. Commissioners can consult the party's representation to establish timeous targets and set out their role in proceedings beforehand as a means of simplifying the arbitration process. Where there is any risk of the representation becoming too formal in their approach, the CCMA should intervene to ensure there remains a level of informality. Furthermore, a survey could be carried out whereby applicants provide feedback as to how the CCMA could simplify its arbitration process and whether the use of representation in certain cases has led to complications.

Additionally, there remains criticism of the approach with which the judicial reviews are carried out. To reiterate what has been stated in the previous chapter, courts are required to look beyond the procedures when undertaking reviews of CCMA awards, notwithstanding section 145 of the LRA; in fact, since *Sidumo,*[481]

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[478] Brown A, "*ACAS arbitration: a case of consumer satisfaction?,*" *IRJ* Vol 23 Issue 3 (1992) 230 – 231.
[479] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No 47 p22.
[480] Ibid.
[481] *Sidumo & Another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC).

they have engaged with the merits too. This has arguably contributed to the number of arbitration awards that are taken on review to the Labour Court, with a detrimental impact on efficiency, informality, accessibility and finality.

Initially, arbitration hearings were not recorded and reviews would be based on the parties' submissions and the arbitrator's notes. However, the courts insisted that a full record be maintained, which has led to complexities and delays when hearing reviews.[482] However, Benjamin[483] argues that it would be beneficial if there were an appeal process that would allow the governing body to determine the fairness of the employer's decision, rather than the fairness of the way in which the arbitrator exercised his decision.[484] He further argues that this suggestion could serve as a guideline for arbitrators with a body of precedent that could provide clarity on dismissal disputes.[485]

### *4.2 ACAS*

For there to be a significant difference when resolving dismissal disputes through public arbitration and the ET compared to conventional methods, there must be incentives for an applicant to pursue this route. Despite ACAS's attempt to maintain strict deadlines in bringing a dismissal claim, it has proven difficult to reach these targets based on the formal legalities required. This includes brief written statements of the case, an arbitration agreement stipulating the parties' consent to using arbitration, as well as other supporting documents outlining their objectives and procedures.[486]

These legal documents must be sent 7 days in advance, and whilst this remains fundamental for the arbitrator (so that he or she can understand the objectives of the parties), it may appear too legalistic for the applicants and thus deter them from applying based on the difficulty of formalising these documents before a hearing. A suggested way around this issue would be for the parties and arbitrator to discuss and sign the arbitration agreement prior to the actual hearing.

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[482] Ibid.
[483] Benjamin P, *"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)"* (2013) *ILO* No 47 p25. See also *Herholdt v Nedbank Ltd* (2012) 33 *ILJ* 1789 (LAC).
[484] Ibid.
[485] Ibid.
[486] Clark J, *"Arbitration is dismissal disputes in South Africa and the UK,*" (1997) 18 *ILJ* 617 – 618.

This will give the more vulnerable and less empowered employees a better chance of a fair agreement with input from a third party with expertise in the field. Additionally, surveys could be conducted to find out whether the parties to a claim would prefer fewer technicalities when coming to arbitration and how this would benefit their needs. Delays and time restrictions in the arbitration process are issues which both the ACAS and the CCMA face, and this will be dealt with in more detail below.

The abolishment of tribunal fees when it comes to employment disputes in England[487] may pose a threat to the arbitration system. Parties may feel inclined to use the ET, as their decisions would be enforceable and they would be provided with a legal route to justice without cost. Although the success of this change remains to be seen, it would require ACAS to reduce their formalities significantly to show the advantages users may enjoy in pursuing arbitration such as fairness and an alternative route to dispute resolution. It is recommended that ACAS make arbitration an obligatory route as they have with conciliation. Based on how the CCMA operates and its experience in this regard, this will reduce the number of trivial matters reaching the tribunal and will likely improve the credibility that ACAS might enjoy.

In the last chapter, it was shown that most arbitration users fail to be satisfied with their arbitrator and this may contribute to the low use of arbitration[488] as a means to resolve dismissal disputes. Additionally, as with the CCMA,[489] parties may be more encouraged to accept an arbitrator's decision if they are provided with the reasons why he or she made the decision they did. In order to refrain from resorting to a legal advisor and increasing the costs of arbitration, it is suggested that arbitrators with the relevant knowledge are selected to hear the relevant cases. Brown's[490] research indicates that the qualities parties consider important for an arbitrator are impartiality and experience in the matter before a hearing.[491] Therefore, it would be appropriate for ACAS to hold workshops and conduct training for

[487] *R (UNISON) v Lord Chancellor* [2017] UKSC 51.
[488] Brown A, "*ACAS arbitration: a case of consumer satisfaction*?" *IRJ* Vol 23 Issue 3 (1992) 230 – 231.
[489] The Labour Relations Act 66 of 1995, s 138(7)(a).
[490] Ibid.
[491] Ibid.

arbitrators to reduce the need for legal advisors and prevent ACAS from interfering with their decisions.

## 5. THE CCMA AND ACAS

Despite both organisations displaying flaws, their benefit to society is the main reason why the need for constant improvement is necessary. The CCMA and ACAS both suffer from delays in decision-making and processing time. It is recommended that both institutes implement an updated quality control system for dismissal dispute resolution. Although the CCMA has a case management system, there is still room for improvement. A quality management system could promote improvement in areas of expeditiousness, client interaction and arbitration quality. Research can be carried out on how effectively dismissal claims are dealt with, whether clients are having their demands met and how successful the arbitrator was in carrying out the proceedings in the least legalistic way. Results from this research could provide valuable insight on how to tackle each of these issues.

Client surveys may enable the institutions to assess whether the clients' needs are being met, and this will aid the institutions in meeting targets. Emphasis should be placed on a reduction in replicating court procedures, and incorporating techniques that allow users to easily access these systems without any additional formalities.

## 6. CONCLUSION

Based on the examination of both institutions, it is plain that the pitfalls of one system could be mitigated by learning from the successes of the other. Labour arbitration is a form of dispute resolution that will require continuous research and development into the way processes are carried out. The challenges the CCMA and ACAS face are issues that require feedback from users, such that an overall improvement of their management can occur. The purpose of arbitration in dismissal matters is to provide an alternative route for applicants to seek resolution. The recommendations provided in this chapter aim not only to seek solutions for the organisations, but also to draw a comparison between ACAS and the CCMA. By each institution learning from one another, they could enhance their arbitration processes in a way that proves tantamount to the original objectives set out by the legislation that created these bodies in the first place.

# CHAPTER SEVEN

## 1. CONCLUSION

The purpose of this dissertation was to ascertain whether the use of public arbitration in South Africa is meeting its objectives of providing swift and accessible dismissal dispute resolution. The progress of the CCMA in resolving dismissal disputes was evaluated according to these performance measurements. As mentioned in chapter one, the increase in dismissal disputes led to the requirement for alternative dispute resolution systems. These systems were necessary to provide users with an avenue to avoid the frustrations that accompanied court litigation. This topic was examined through a comparative study between England and South Africa, due to their similar approaches in using public arbitration to resolve dismissal disputes.

Throughout the dissertation, the elements of efficiency, accessibility and formality were considered with respect to the two countries and their public arbitration institutions. The second chapter addressed how the history of South Africa played a prominent role in shaping the way the country handled disputes. Following a political shift, the LRA[492] came into effect with the notion of simplifying the resolution procedures. The chapter also examined how the CCMA was formed in order to fulfil some of the LRA's main aims of promoting social justice and the efficient resolution of labour disputes. Supported and informed by the LRA[493] and the Code of Good Practice,[494] the CCMA was able to operate in a manner that adheres to the legislation whilst simultaneously making independent decisions. In this way, its independence as an administrative body whose arbitration decisions remained final was recognised.[495]

Chapter three expanded on the powers of the CCMA and noted how far it was able to balance the needs of the parties to a dismissal dispute in a manner which differed from formal court procedures. This was proven to be largely successful based on the CCMA's high referral rate,[496] and that the CCMA aims to have the arbitration awards issued within 14 days from the conclusion of the proceedings.[497]

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[492] The Labour Relations Act 66 of 1995.
[493] Ibid.
[494] Code of Good Practice: Dismissal (Schedule 8 to the LRA).
[495] Benjamin P, "*Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)" ILO* No 47 (2013) p21.
[496] CCMA. 2015/2016 Annual Report. Report Number 209/2016. CCMA Publications.
[497] The Labour Relations Act 66 of 1995, s 138(7)

The shortcomings of the CCMA were addressed, and it was clear that the lack of human and financial resources coupled with a greater increase in caseload has left arbitrators under immense pressure to resolve disputes quickly and effectively.

It is at this point that the comparative study shifted towards the English dispute resolution system. The notable differences between South Africa and England legislation were discussed, as the UK continues to be regulated without a Constitution. Despite this distinction, from an examination of the English history of dispute resolution, an underlying argument was found, calling for increased alternative dispute mechanisms to resolve disputes through means other than tribunals. Acts, such as the Employment Rights (Dispute Resolution) Act[498] and the Employment Act of 2008,[499] played a crucial role in developing the English public arbitration system. Additionally, ACAS, by creating a Scheme which guided arbitrators in a regulated way has allowed the regulation of arbitrator's actions during hearings. As with the CCMA, ACAS has its own Code of Practice[500] which was formed with the intention to ensure that arbitrators determine the terms of reference and reiterate the standards of reasonableness throughout the process.[501] This mechanism reemphasised the importance of upholding disciplinary procedures in the workplace by striving to resolve disputes internally before taking further action.

Since its formation in 1972, ACAS has been developing as an institution in England. The implementation of the Scheme proved successful in that disputes were resolved much swifter during arbitrations.[502] Despite the guidance and accessibility it provides, there are still certain conditions which require improvement. Suggested improvements were noted in chapter six, where it is shown that ACAS tends to fall short in areas where the CCMA thrives. The need for reasons when making an award, an appropriate review system and making arbitration a compulsory process as opposed to it being voluntary would aid in improving the low referral rates for

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[498] Employment Rights (Dispute Resolution) Act of 1998.
[499] Employment Act 2008
[500] ACAS Code of Practice on Disciplinary and Grievance Procedures, < http://www.acas.org.uk/media/pdf/f/m/Acas-Code-of-Practice-1-on-disciplinary-and-grievance-procedures.pdf> last accessed January 8th 2018
[501] ACAS Arbitration Scheme 2001, part IV, para 12.i at 10
[502] Earnshaw J & Hardy S, "*Assessing an Arbitral Route for Unfair Dismissal*," *ILJ* Vold 30 (2001) 303.

arbitration through ACAS.[503] Further awareness needs to be carried out by ACAS to educate ACAS users of the alternative mechanisms within the body.

It was found that the CCMA has faced an increasing caseload with a significant lack of financial and human resources. Criticism of its inconsistency when making decisions, and the tension between s 138 and the CCMA Guidelines on Misconduct Arbitrations in relation to commissioners' decisions add to its deficiencies. It is suggested that amendments and clarifications be made so as to maintain informality, efficiency and fairness in the CCMA's approach to arbitration proceedings.

Furthermore, ACAS and the CCMA require improvements which can be implemented through a variety of quality control surveys, awareness of the institute's arbitration procedures and training workshops for arbitrators. These suggestions could aid in improving the approach which arbitrators take towards their hearings as well as their skills. In turn, the need for legal advisors and other legal technicalities may be reduced.

Despite its aforementioned flaws, the CCMA has proven to be a success even though it has not been around for as long as ACAS. Ironically, despite the historical umbilical cord attached between South Africa and England, the progress the CCMA has made in dispute resolution appears to exceed that of ACAS. It is clear that both systems can learn from the other, despite the fact that England is a much more developed country than South Africa. Both institutions tend to implement similar systems despite their different approaches, and research should continuously be undertaken for the best development of their practices. Dismissals remain inevitable in every country and therefore, it is worth noting that the adoption of public arbitration proves to be a growing necessity across the world as a mechanism of promoting efficiency and reducing dismissal claims whilst meeting the needs of employees and employers alike.

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[503] ACAS. 2016/2017 Annual Report and Accounts, Government Publication available at < http://www.acas.org.uk/media/pdf/e/s/Acas-annual-report-2016-2017.pdf> last accessed 10 January 2018 p35.

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*Naraindath v CCMA* 2000 21 ILJ 1151 (LC).
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